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Supreme Court, U.S.
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In The Supreme Court of the United States

MICHAEL T. HOWELL AND CHERI A. HOWELL,

Petitioners,

v.

HUGH RICCI, P.E., STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, AND PACIFIC RECLAMATION WATER COMPANY, A NEVADA CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Nevada

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the State Engineer of Nevada deprived the Howells and their predecessors, Alonzo and Clair Knudsen (the Knudsens) of property without due process of law, by divesting their ranch of its water rights after notice by publication alone.

2. Whether the State Engineer of Nevada deprived the Howells and the Knudsens of property without due process of law, by divesting their ranch of water rights pursuant to a Nevada statute which did not extend such authority to the State Engineer.

LIST OF PARTIES

The Petitioners, Michael T. Howell and Cheri A. Howell were the appellants in the appeal to the Supreme Court of Nevada.

The Respondents Hugh Ricci, State Engineer, and Pacific Reclamation Water Company were the respondents in the appeal to the Supreme Court of Nevada.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The case sought to be reviewed is Case No. 39788 in the Supreme Court of the State of Nevada, *Howell et al. v. Ricci et al.*, reproduced in Appendix ("App.") 1-12.

The opinion of the Sixth Judicial District Court of Nevada, Case No. CV 2804-5, is reproduced in App. 13-29.

The letter decision of the Division of Water Resources, dated July 19, 1999 is reproduced in App. 30-31.

JURISDICTION

The Order of Affirmance by the Supreme Court of Nevada was entered on April 1, 2004 (App. 1). Pursuant to Supreme Court Rule 13.3, this Petition was filed timely, within 90 days of entry of judgment.

This Court has jurisdiction to review the Order of Affirmance under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISION INVOLVED

This Petition is based upon Section 1 of the Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

NEVADA STATUTES INVOLVED

Nevada statutes involved are NCL 1929 §7944, §7946, §7947, §7948, and §7970. These statutes were in effect in 1944 (App. 38-44).

STATEMENT OF THE CASE

The Petitioners, Michael T. and Cheri A. Howell, own a ranch in Elko County, Nevada, on tributaries of the Humboldt River. (App. 87). In 1944 the owners of the same ranch were Alonzo and Clair Knudsen, who had purchased it in 1942. (App. 32).

The water rights deeded with the ranch included a portion of Proof 00608 in the Humboldt River Decree adjudicated with a priority of 1876.[1] These rights entitled the ranch to 442.32 acre feet of water from Bishop Creek and Burnt Creek on 147.44 acres of land, between April 15 and August 15 of each year. (App. 87-88).

On June 14, 1944, Pacific Reclamation Water Company (Pacific Reclamation), an upstream neighbor of the

[1] Adjudication is the statutory process in Nevada by which water rights which pre-date the water statutes (vested rights) are located and prioritized. See *Bergman et al. v. Kearney*, 241 F. 884, 891 (D. Nev. 1917).

Knudsens, filed Application Nos. 11125 and 11127 with the State Engineer of Nevada to transfer water rights from more than 600 acres of land. This acreage included land owned by the Knudsens. (App. 37, 45, 55). The Applications do not mention the Knudsens.

The State Engineer published notice of each Application for five weeks in a newspaper in Wells, Nevada from July 7, 1944 to August 4, 1944. The notices do not warn the Knudsens of a threat to their water rights or mention the Knudsens by name (App. 65-68).

On September 12, 1944, the State Engineer granted the Applications. (App. 3). He followed with Certificates of Appropriation to Pacific Reclamation on February 4 and 14, 1945. (App. 69 and 75). However, he did not close the Knudsens' headgates on either creek. (App. 3).

By 1962 the Knudsens had discovered the State Engineer's 1944 action, because their attorney inquired of the State Engineer. (App. 81). The State Engineer replied that the water rights had been transferred and that Pacific Reclamation had acquired them by virtue of a Quitclaim Deed dated June 5, 1944. This deed was not from the Knudsens, and it post-dated their acquisition of the ranch. (App. 83). In 1986, the State Engineer also sent letters to Royce Wood, another predecessor of the Howells, reaffirming the validity of Pacific Reclamation's permits. Still, the State Engineer did not terminate the distribution of water to the ranch. (App. 3).

On August 19, 1997, Mr. and Mrs. William Robert Hawks, the immediate predecessors to the Howells, submitted a report of conveyance to the State Engineer in

their favor. In this, the Hawks presented their chain of title to the property and requested the State Engineer assign a 116.43-acre portion of Proof 00608 (Bishop Creek) to show them as the current owners of record. The Howells acquired the ranch from the Hawks on August 20, 1997. (App. 4).

Eighteen months later, on February 11, 1999, the State Engineer replied that Pacific Reclamation's 1944 permits were valid and had effectively transferred the water rights appurtenant to the ranch to a new place of use. (App. 4).

The Hawks challenged the State Engineer's determination via a separate letter dated May 25, 1999, asserting that, because Pacific Reclamation did not appear in their chain of title, the 1944 transfer of water rights to Pacific Reclamation evidenced by the permits was incorrect. On June 15, 1999, the State Engineer reversed his position and stated that the records demonstrated the Hawks as owners of the subject portion of Proof 00608. (App. 4).

By letter of July 19, 1999, the State Engineer rescinded the June 15, 1999 notice, stating that no appurtenant water rights existed under Proof 00608 in connection with the subject property. The State Engineer ordered the headgates to the ranch closed on April 28, 2000. (App. 4).

On August 18, 1999, the Howells filed a petition for judicial review challenging the implied ruling set forth in the State Engineer's July 19, 1999 letter to the Hawks. In their petition, the Howells requested that Applications 11125 and 11127 be declared null and void insofar as they purported to transfer the Knudsens' interest in Proof 00608. (App. 4, 95). The District Court sustained the State

Engineer's decision to reject the Hawks'/Howells' report of conveyance and dismissed the Howells' petition for judicial review with prejudice. (App. 4-5).

The Howells timely filed their appeal to the Supreme Court of Nevada. (App. 5). In their opening brief the Howells raised the two Constitutional issues which are the foundation of this Petition. (App. 99-110).

In opposition, Pacific Reclamation argued *inter alia* that the Court did not have to consider the Constitutional issues because they were being raised for the first time. (App. 112-114). The Howells addressed this issue in their reply brief. (App. 118-123).

The Nevada Supreme Court denied the Howells' appeal and affirmed the lower court decision (App. 1-2). The Court made its decisive legal conclusion while reciting the factual background of the case:

> On September 12, 1944, the State Engineer granted Pacific Reclamation's applications. This had the effect of divesting The Knudsen/Howell property of its appurtenant riparian rights. (App. 3).[2]

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[2] The Court purported to confirm the divestiture of the Knudsens' "riparian rights." This is curious because Nevada long ago renounced the riparian doctrine in favor of prior appropriation. *Jones v. Adams*, 6 P. 442 (Nev. 1885); *Reno Smelting, Milling and Reduction Works v. Stevenson*, 21 P. 317, 322 (Nev. 1889). Without the doctrine of prior appropriation, much of the land in the arid west would be worthless. Nevada's water rights adjudication statutes adopted the doctrine in 1913. See *Bergman et al. v. Kearney*, *supra*, pp. 891-894. Proof 00608 was adjudicated under the doctrine, i.e. the right has a priority, a point

(Continued on following page)

In a footnote the Court further stated:

> (24) In light of our disposition of the other issues litigated in this appeal, we reject the Howells' claim that the original 1944 permits are void for lack of procedural due process. (App. 11).

REASONS FOR GRANTING THE WRIT

The Order of Affirmance issued by the Supreme Court of Nevada has decided an important federal question in a way that conflicts with long standing decisions of the Supreme Court of the United States.

I. Inadequate Notice to the Property Owner

The Order of Affirmance ruled that the State Engineer of Nevada had divested the Knudsens of their water rights in favor of Pacific Reclamation, based upon notice by publication alone. (App. 2-3; 41-42; 65-68).

Of various methods of giving the Knudsens notice that their water rights were about to be taken away (personal service, mailing, posting on headgate, and publication), publication is the least personal and least likely to accomplish the purpose. *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 315 (1950); see also *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 800 (1983) which states:

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of diversion and a place of use. See *Cappaert v. United States*, 426 U.S. 128, 139 (1976).

> Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable.

The Supreme Court of Nevada has previously encountered *Mullane* and *Mennonite*. In *Continental Insurance Co. v. Moseley*, 653 P.2d 158 (Nev. 1982), 436 U.S. 1202 (1983), 683 P.2d 20 (Nev. 1984), the Supreme Court of Nevada unanimously ruled that published notice to creditors in a summary estate proceeding met the standard of *Mullane*. The aggrieved creditor petitioned the United States Supreme Court for a writ of certiorari which was granted, and the case was remanded in a memorandum opinion. The Nevada Supreme Court promptly revised its position. Published notice in the case at hand is no more likely to reach an unsuspecting rancher, than published notice to creditors in an estate proceeding. *Walker v. City of Hutchinson*, 352 U.S. 112, 116 (1956) offers germane comment:

> Measured by the principles stated in the Mullane Case, we think that the notice by publication here falls short of the requirements of due process. It is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property. In Mullane we pointed out many of the infirmities of such notice and emphasized the advantage of some kind of personal notice to interested parties. In the present case there seem to be no compelling or even persuasive reasons why such direct notice cannot be given. Appellant's name was known to the city and was on the official records. Even a

> letter would have apprised him that his property was about to be taken and that he must appear if he wanted to be heard as to its value.

At least in *Walker*, the published notice was directed to the landowner. Even if the Knudsens had seen the State Engineer's notices, it is doubtful they would have realized that they were in any way involved. (App. 65-68).

The Howells were further disadvantaged by the subsequent behavior of the State Engineer. Instead of cutting the Knudsens off at the beginning of the 1945 irrigation season, which would have stimulated litigation long before the Howells bought the ranch, the State Engineer continued to provide water to the ranch for 55 years, as though nothing had happened. Inadequate notice to the Knudsens made the State Engineer's decisions void in 1944. They are not revived by postponement of action out on the ranch.

II. Misuse of Nevada's Water Statutes

It is a violation of due process to divest a person of a property right, by use of a statute which does not authorize such a proceeding. See *Noble v. Union River Logging Co.*, 147 U.S. 165, 176 (1892). In 1944 the statutes which gave the State Engineer authority to receive and approve water right applications read in pertinent part as follows:

> §7944:
>
> Any corporation authorized to do business in this state, or any citizen of the United States, or any person who has legally declared his intention to become such, over the age of twenty-one years, desiring to appropriate any of the public waters, or to *change the place of diversion, manner of use*

> *or place of use of water already appropriated, shall, before performing any work in connection with such appropriation, change in place of diversion or change in manner or place of use,* make an application to the state engineer for a permit to make the same . . . (emphasis added). (App. 38-39).

§7948:

> It shall be the duty of the state engineer to approve all applications made in proper form where all fees, as in this act provided, have been paid, which contemplate the application of water to beneficial use, and *where the proposed use or change does not tend to impair the value of existing rights,* or be otherwise detrimental to the public welfare. But where there is no unappropriated water in the proposed source of supply, *or where its proposed use or change conflicts with existing rights,* or threatens to prove detrimental to the public interests, it shall be the duty of the state engineer to reject said application and refuse to issue the permit asked for . . . (emphasis added). (App. 43).

§7970:

> Nothing in this act contained shall impair the vested right of any person to the use of water, . . . (App. 44).

When read together, these statutes make sense only if the legislature assumed that persons who already owned water rights could apply to change the places of diversion or use of those rights. Otherwise, such an application would always conflict with existing rights, and in this case would also impair vested rights in violation of §7970. In *Salmon River Canal Co., Ltd. v. Bell Brand Ranches, Inc.*,

564 F.2d 1244 (9th Cir. 1977), *cert. denied*, 436 U.S. 918 (1978), the Ninth Circuit addressed a conflict between a prior vested surface right and a subsequent underground permit. The Court stated:

> We also note that there is no statute, called to our attention or found in independent search, that requires a protest at the peril of losing pre-existing rights by failing to protest. Nor has any case been brought to our attention, either in Nevada or from any of the arid Western States, which holds that a failure to protest a permit application will render the determinations made in the application final and conclusive to the extent that they may impair or obliterate pre-existing rights.
>
> Our review of the Nevada permit procedures convinces us that an issued permit creates only a public record of a claimed right for water use administration. It does not create a right as against "existing rights on the source." At page 1248.

This language reinforces the Howells' position that Nevada's water permit statutes do not grant the State Engineer explicit or inherent authority to divest pre-existing vested rights.

III. The Order of Affirmance

Normally a state's highest court provides the ultimate interpretation of state statutes, but in doing so, the court may not ignore the Fourteenth Amendment right of its citizens to protection from collateral divestiture of their property. In its Order of Affirmance, The Supreme Court of Nevada exhibits little concern for the foregoing issues of due process, both of which were presented to it. (App.

99-110). It dismisses them in a footnote. (App. 11). This footnote is both revealing and uninformative. The Court does not decline to address the due process issues. It rejects them on their merits, by stating that the 1944 permits are not void. The Court apparently connects the due process issues in some way to the "other issues" addressed in its Order, but the footnote offers no further explanation.

The necessities of due process required the State Engineer to give reasonable notice of his intentions to the Knudsens, and to divest them of their water rights using a statute or proceeding which is directed to that purpose (e.g., eminent domain, contempt, or tax foreclosure).[3] A thorough examination of the entire Order of Affirmance reveals no connection *per se* between the Court's disposition of the remaining issues and the due process issues. The Court does address the matter of voidness by implication in the following statements:

> Thus the Pacific Reclamation permits on file with the State Engineer satisfied all public notice and filing requirements extant at the time of their approval. Therefore we conclude that Pacific Reclamation's permits were valid at the time of their issuance. (App. 6).

The Court must have concluded that technical compliance with state law obviates due process. That is to say, if the Knudsens failed to timely protest and appeal, defective notice is no defense; and if the State Engineer complied with NCL 1929 §7944 and §7948, the purpose for which these

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[3] See for example *State of Nevada v. Sustacha*, 826 P.2d 959 (Nev. 1992).

statutes was passed does not matter. In the space of a footnote the Court has rejected *Mullane*, *Mennonite, Continental* and *Noble* insofar as Nevada's water law is concerned.

Finally, the Order of Affirmance subverts Nevada's statutory adjudication process for vested water rights. This process was held constitutional in 1917. *Bergman et al. v. Kearney*, *supra*. The effect of the Order of Affirmance is to allow a right vested and adjudicated through a constitutional process to be subsequently divested without regard for constitutional due process.

CONCLUSION

The Petitioner respectfully submits that a Writ of Certiorari be granted; the Order of Affirmance be vacated; and the case be remanded to the Supreme Court of Nevada for further consideration in light of the authorities presented herein.

Respectfully submitted,

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RECLAMATION WATER COMPANY,
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Respondents.

No. 39788

ORDER OF AFFIRMANCE

(Filed Apr. 1, 2004)

Michael and Cheri Howell appeal the district court's denial of their petition for judicial review of a State Engineer decision refusing their report of conveyance of rural water rights.[1]

The Howells contend on appeal that the district court misapplied governing statutory requirements in affirming the decision of the State Engineer and, thus, erroneously: applied a substantial evidence standard in its evaluation of the petition for judicial review; concluded that substantial evidence supported the State Engineer's determination; found that the petition was procedurally barred; and

[1] *See* NRS 533.450(8).

failed to grant equitable relief. Additionally, the Howells argue that the State Engineer arbitrarily approved another transfer of water rights under the same claim number, and that the State Engineer violated their procedural due process rights. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

This is a dispute over 116.43 acres of water rights that were adjudicated as a part of proof 608 of the Humboldt Decree.[2] Metropolis Land Company originally held the subject rights through permits 1000 and 1807. Pacific Reclamation Water Company ultimately acquired these water rights through later transfers.

On June 14, 1944, Pacific Reclamation filed applications 11125 and 11127 with the State Engineer to change the point of diversion, manner and place of use of the 116.43 acres (again, a portion of the public water rights appropriated under proof 608). The applications sought to move the existing point of diversion away from the Howells' land,[3] then owned by one of their predecessors in interests, Alonzo Knudsen, to land owned by Pacific Reclamation. The State Engineer published Pacific

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[2] "In 1930 and 1935, [a district court] entered two decrees that adjudicated rights to the waters in the Humboldt River and its tributaries. . . . These decrees are collectively referred to as the 'Humboldt Decree.'" *State Engineer v. Sustacha*, 108 Nev. 223, 224, 826 P.2d 959, 959 (1992).

[3] The land was specifically described in the applications as NW¼ SW¼, Section 1, Township 38N, Range 61E (application 11125), and SE¼ NE¼, Section 2, Township 38N, Range 61E (application 11127) M.D.B.&M.

Reclamation's applications in the Wells, Nevada, newspaper for five weeks, from July 7, 1944 until August 4, 1944.

On September 12, 1944, the State Engineer granted Pacific Reclamation's applications. This had the effect of divesting the Knudsen/Howell property of its appurtenant riparian rights. Pacific Reclamation did not record a deed or instrument of conveyance regarding the appropriation with the State Engineer or the county recorder. However, Pacific Reclamation's applications and permits remained on file with the State Engineer, and Mr. Knudsen never challenged their issuance. Despite these permits, the headgates to the property remained open for many years until after the Howells' acquisition of the parcel.

On June 18, 1962, Mr. Knudsen sent a letter to the State Engineer regarding one of Pacific Reclamation's permits. In its reply, the State Engineer confirmed their validity. In 1986, the State Engineer also sent letters to Royce Wood, another predecessor of the Howells, reaffirming the validity of Pacific Reclamation's permits and stated, "a water right no longer exists in [your property]."[4] This notwithstanding, the State Engineer did not terminate the distribution of water to the property in question.

On August 19, 1997, Mr. and Mrs. William Robert Hawks, the immediate predecessors to the Howells, submitted a report of conveyance to the State Engineer in their favor. In this, the Hawks presented their chain of title to the property and requested the State Engineer

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[4] The subject property, from which the rights had been diverted, was again specifically described in the letter as "Section 1 and 2, T.38N, R.61E, M.D.B.&M."

assign the 116.43-acre portion of proof 608 to show them as the current owners of record. The Howells acquired this property from the Hawks on August 20, 1997.

On February 11, 1999, the State Engineer replied that Pacific Reclamation's 1944 permits were valid and had effectively transferred the water rights appurtenant to the Hawks' land to a new place of use.

The Hawks challenged the State Engineer's determination via a separate letter dated May 25, 1999, asserting that, because Pacific Reclamation did not appear in their chain of title, the 1944 transfer of water rights to Pacific Reclamation evidenced by the permits was incorrect. On June 15, 1999, the State Engineer stated that its records demonstrated the Hawks as owners of the subject portion of proof 608. This determination was expressly "subject to amendment upon receipt of additional documentation."

By letter of July 19, 1999, the State Engineer rescinded the June 15, 1999 notice, stating that no appurtenant water rights existed under proof 608 in connection with the subject property.[5]

On August 18, 1999, the Howells filed a petition for judicial review challenging the implied ruling set forth in the State Engineer's July 19, 1999 letter to the Hawks. The district court sustained the State Engineer's decision to reject the Hawks'/Howells' report of conveyance and dismissed the Howells' petition for judicial review with

[5] The State Engineer ordered the headgates to the subject property closed on April 28, 2000.

prejudice. The district court concluded that the petition essentially sought review of the State Engineer's 1944 decision and, thus, was procedurally barred under NRS 533.405(1) and (3). The district court also affirmed the State Engineer's finding of a binding and legitimate conflict in the Howells' chain of title stemming from the preexisting Pacific Reclamation permits, which, by statute, prohibited the State Engineer from granting or accepting the report of conveyance. The Howells filed their timely appeal.

DISCUSSION

NRS 533.382

The Howells argue that the State Engineer's 1944 appropriation to Pacific Reclamation is not binding against them as a matter of law because Pacific Reclamation did not comply with NRS 533.382, which requires that an application or permit to change the place of diversion, manner of use or place of use must be made by deed and recorded with the county recorder.[6] Failures to comply with NRS 533.382 render such conveyances void as against subsequent purchasers.[7]

Nevada Compiled Laws were the applicable statutory laws in 1944. Under NCL 7951, a permit to appropriate

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[6] NRS 533.382(1) and (3). Based upon this argument, the Howells contend that the district court erred in applying a substantial evidence standard of review to a question of law, which should have received a *de novo* review.

[7] NRS 533.383.

water was binding if filed in the office of the State Engineer.[8] The statutory construct in effect at that time did not require a party to file a deed with the county recorder or with the State Engineer.[9] Thus, the Pacific Reclamation permits on file with the State Engineer satisfied all public notice and filing requirements extant at the time of their approval. Therefore, we conclude that Pacific Reclamation's permits were valid at the time of their issuance. Additionally, the NRS 533.382 requirements concerning water rights do not apply to Pacific Reclamation's permits. First, the legislature did not enact that provision until 1995; second, the statute must be prospectively applied.[10]

Substantial evidence

Having determined that the title was not defective under the 1995 statutory construct, our review is limited to whether substantial evidence supports the decision and, thus, we will not reweigh the evidence.[11] Substantial evidence is that which a reasonable person would accept in support of a conclusion.[12]

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[8] Nev. Compiled Law § 7951 (1929).

[9] *Id.*

[10] The legislative history specifically states, "[t]he bill's provisions do not apply to transactions conducted prior to October 1, 1995." Nevada Legislative Counsel Bureau, Research Div., 68th Leg., Summary of Legislation 1 (Nev. 1995).

[11] *State Engineer v. Morris,* 107 Nev. 699, 701, 819 P.2d 203, 205 (1991).

[12] *McClanahan v. Raley's, Inc.,* 117 Nev. 921, 924, 34 P.3d 573, 576 (2001).

Under 533.386(1)(b), when confirming a record of conveyance, the State Engineer must determine that no conflict exists in the chain of title based on the submitted documents and any information on file with the State Engineer. "If the state engineer determines that the report of conveyance is deficient, he shall reject the report . . . and return it to the person who submitted it . . . ."[13]

Upon receiving the Hawks' request for a report of conveyance, the State Engineer consulted the submitted chain of title documents and his own files regarding the subject land. The files contained the permits issued to Pacific Reclamation, which appropriated the water rights of the Hawks' property. Because the files clearly showed a conflict in the chain of title, we conclude that the State Engineer's decision is supported by substantial evidence.

Procedural bar

The Howells contend that they filed a timely appeal of the State Engineer's July 19, 1999 letter as required under NRS 533.450, and the district court erred in determining they were, of necessity, seeking judicial review of the State Engineer's 1944 permits to Pacific Reclamation.

NRS 533.450 establishes the procedure by which a person aggrieved by a decision or order of the State Engineer granting or denying a record of conveyance may obtain judicial review. A party must commence proceedings to review the decision or order within thirty days following

[13] NRS 533.386(2).

its rendition.[14] "This court strictly construes statutes dealing with mandatory filing dates in water rights actions . . . ."[15]

The implied ruling contained within the State Engineer's July 19, 1999 letter did not constitute a final determination as to the ownership of the subject water rights that would be subject to review under the Nevada Administrative Procedures Act. Rather, the State Engineer finally determined the subject rights in 1944 in accordance with then applicable notice and filing requirements. The failure of the Howells' predecessors to appeal the 1944 decision procedurally bars the Howells from contesting it.

Equitable relief

The Howells request equitable relief from the State Engineer's decision.

"'[I]t is . . . settled in this state that the water law and all proceedings thereunder are special in character, and the provisions of such law not only lay down the method of procedure but strictly limit[ ] [the method] to that provided.'"[16] We have, however, under rare circumstances, indicated that decisions of the State Engineer may be an appropriate subject of equitable relief.

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[14] NRS 533.450(1).

[15] *Preferred Equities v. State Engineer*, 119 Nev. ___, ___, 75 P.3d 380, 383 (2003).

[16] *Preferred Equities Corp. v. State Engineer*, 119 Nev. ___, ___, 75 P.3d 380, 383 (2003) (quoting *Application of Filippini*, 66 Nev. 17, 27, 202 P.2d 535, 540 (1949)).

The present case is dissimilar from prior cases where we have affirmed or ordered equitable relief to property owners regarding the termination of water rights. In *Engelmann v. Westergard,*[17] *Bailey v. State of Nevada*[18] and *State Engineer v. American National Insurance Company,*[19] the State Engineer cancelled water rights' permits because the permittees failed to timely file proofs of beneficial use.[20] We held that a determination of the State Engineer to correctly cancel "a permit, pursuant to his statutory mandate, did not affect the power of the district court to grant equitable relief to the permittee when warranted."[21] Because there had been actual use or development in compliance with the Nevada water statutes, and because the failures to file the proofs were corrected within a reasonable time, we either affirmed awards of equitable relief or remanded with instructions to award the same.

We see no abuse of discretion in the district court's refusal to grant similar relief in the instant matter.[22] In this case, the Howells did not detrimentally rely on the appurtenant water rights, knowing that the Hawks' record of conveyance was pending with the State Engineer prior

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[17] 98 Nev. 348, 351, 647 P.2d 385, 387 (1982).

[18] 95 Nev. 378, 383, 594 P.2d 734, 738 (1979).

[19] 88 Nev. 424, 425, 498 P.2d 1329, 1330 (1972).

[20] *See* NRS 533.410 (cancellation of water rights for failure to file beneficial use statements).

[21] *Engelmann,* 98 Nev. at 351, 647 P.2d at 387; *see also Bailey,* 95 Nev. at 381, 594 P.2d at 736; *American Nat'l Ins. Co.,* 88 Nev. at 426, 498 P.2d at 1330.

[22] *See Williams v. Rhodes,* 393 U.S. 23, 65 (1968) (the traditional standard of review for the denial of equitable relief is whether the district court abused its discretion in denying equitable relief).

to their purchase of the property. Additionally, Pacific Reclamation's permits had been on file with the State Engineer since approval in 1944, thus leaving the land the Howells purchased with no ownership in the water rights at issue. We therefore conclude that equitable relief under these facts is not warranted.

Dalton Livestock

The Howells contend, that the State Engineer arbitrarily approved a record of conveyance for Dalton Livestock on a portion of proof 608, but refused to approve the Howells' record. However, the Dalton Livestock water rights on proof 608 do not include the 116.43 acres of appurtenant water rights owned by Pacific Reclamation, which the Howells contest. Additionally, the Howells fail to cite to any authority to support this contention. Therefore, we conclude that this argument lacks merit.[23]

CONCLUSION

We affirm the district court judgment dismissing the Howells' petition for judicial review and affirming the State Engineer's decision to deny the report of conveyance. We conclude that: substantial evidence supported the State Engineer's decision; the district court correctly concluded that the Howells' petition was procedurally barred; and equitable relief is not warranted in this case. Accordingly, we

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[23] *Plankinton v. Nye County*, 95 Nev. 12, 12, 588 P.2d 1025, 1025 (1979) (error alleged as to dismissal of complaint would not be sustained on appeal absent citation of relevant authority).

ORDER the judgment of the district court AFFIRMED.[24] [25]

/s/ Shearing, C.J.
Shearing

/s/ Agosti, J.
Agosti

/s/ Rose, J.
Rose

/s/ Becker, J.
Becker

/s/ Maupin, J.
Maupin

/s/ Gibbons, J.
Gibbons

/s/ Leavitt, D.J.
Leavitt

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[24] In light of our disposition of the other issues litigated in this appeal, we reject the Howells' claim that the original 1944 permits are void for lack of procedural due process.

[25] The Honorable Michelle Leavitt, Judge of the Eighth Judicial District Court, was designated by the Governor to sit in place of the Honorable Myron Leavitt, Justice. Nev. Const. art. 6, § 4.

cc: Hon. Richard Wagner, District Judge
Marshall Hill Cassas & de Lipkau
Wilson & Barrows
Attorney General Brian Sandoval/Carson City
Goicoechea, DiGrazia, Coyle & Stanton, Ltd.
Humboldt County Clerk

Case No. CV 2804-5

Department 1

SIXTH JUDICIAL DISTRICT COURT
IN AND FOR THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

MICHAEL T. HOWELL
and CHERI A. HOWELL,

Petitioners,

v.

HUGH RICCI, P.E., STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, STATE OF NEVADA; and PACIFIC RECLAMATION WATER COMPANY, a Nevada corporation,

Respondents. /

FINDINGS OF FACTS, CONCLUSIONS OF LAW AND JUDGMENT

(Filed May 23, 2002)

The above-entitled civil action being at issue upon the Second Amended Petition for Judicial Review of the Petitioners and the Respondents' respective responses thereto came on regularly to be heard by this Court, sitting without a jury, on the 22nd day of April, 2002. The Petitioners MICHAEL T. HOWELL and CHERI A. HOWELL were represented at the hearing by Ross E. de Lipkau of the Law Firm of Marshall, Hill, Cassas & de Lipkau, of Reno, Nevada. Respondents HUGH RICCI, P.E., STATE ENGINEER, DIVISION OF WATER RESOURCES DEPARTMENT OF CONSERVATION AND

NATURAL RESOURCES, STATE OF NEVADA were represented by Paul Taggart of the Office of the Attorney General, State of Nevada. Respondent PACIFIC RECLAMATION WATER COMPANY was represented by David M. Stanton of the Law Firm of Goicoechea, Di Grazia, Coyle & Stanton, Ltd., of Elko, Nevada. Pre trial briefs were ordered by the Court, said briefs were filed in accordance with the Court's Order, and the matter now stands submitted.

FINDINGS OF FACT

This Court makes the following findings of fact based upon the written record submitted by the parties:

1. On June 14, 1944, Pacific Reclamation Water Company filed with the Office of the State Engineering two Applications for Permission to Change Point of Diversion, Manner of Use and Place of Use of the Public Waters of the State of Nevada Heretofore Appropriated, bearing the serial numbers 11125 and 11127.

2. Application 11125 was submitted for the purpose of changing the point of diversion and place of use with respect to 6.320 cubic feet per second of water from Bishop Creek in Elko County, Nevada, as follows:

A. The point of diversion was changed from the former location at:

> NW¼ SW¼, Sec. 1, T3 8N, R61 E; SW¼ SW¼, Sec. 31, T39N, R62E; SW¼ NW¼, Sec. 27 and NW¼ SE¼, Sec. 28, T39N, R62E;

to a new location at:

> NW¼ SW¼, Sec. 27, T39N, R62E, or at a point which bears N15° 05' E, 4285 feet from the S ¼ Cor. of said Sec. 27.

B. The place of use was changed from the former location at:

> Portions of Secs. 28, 29, 31 and 32, T39N, R62E, and portions of Secs. 1 and 2, T38N, R61E (513.62 Acres);

to a new location at:

> All or portions of Secs. 18, 19, 28, 29, 30, 31, 32, T39N, R62E, and Secs. 13, 14, 15, 22, 23, 24, 25, T39N, R61E, M.D.M.

3. Application 11127 was submitted for the purpose of changing the point of diversion and place of use with respect to 1.375 cubic feet per second of water from Burnt Creek in Elko County, Nevada, as follows:

A. The point of diversion was changed from the former location at:

> NW¼ NW¼ and SW¼ NW¼ of Sec. 25, T39N, R61E; SE¼ NE¼ of Sec. 2, T38N, R61E;

to a new location at:

> SW¼ NE¼ of Sec. 13, T39N, R61E, or at a point which bears N34° 10' W, 3255 ft from the SE Cor. of said Sec. 13.

B. The place of use was changed from the former location at:

> W½ SW¼; SW¼ NW¼; SE¼ NW¼; NE¼ SW¼, all in Sec. 25, T39N, R61E and NE¼ SW¼; SE¼ SW¼, all in Sec. 2, T38N, R61E (111.85 acres);

to a new location at:

All or portions of Secs. 18, 19, 28, 29, 30, 31, 32, T39N, R62E, and Secs. 13, 14, 15, 22, 23, 24, 25, T39N, R61E, M.D.M.

4. The Office of the State Engineer determined that Pacific Reclamation Water Company had presented title documentation supporting ownership of the water rights describe in Applications 11125 and 11127.

5. Affidavits of Publication indicate that Applications 11125 and 11127 were published in the Wells Progress, a weekly newspaper published in Wells, Nevada, for five weeks, with the first publication on July 7, 1944 and the last publication on August 4, 1944.

6. There is no record that an objection to either Application was filed with the Office of the State Engineer within thirty days of the date of the last publication.

7. On February 14, 1945, Application 11125 was granted by the Office of the State Engineer, as described in Certificate of Appropriate Number 2846, which was issued thereon.

8. On February 4, 1945, Application 11127 was granted by the Office of the State Engineer, as described in Certificate of Appropriation Number 2848, which was issued thereon.

9. There is no record that any person filed a petition for judicial review of either Certificate Number 2846 or Certificate Number 2848 within thirty days of their respective dates of issuance.

10. The former points of diversion and places of use described in Applications 11125 and 11127 are located on lands presently owned by the Petitioners.

11. The new points of diversion and places of use described in Applications 11125 and 11127 are located on lands presently owned by shareholders in Respondent Pacific Reclamation Water Company.

12. On June 18, 1962, Alonzo Knudsen, Petitioners' predecessor, through his attorney Ross P. Eardley, sent a letter to the Office of the State Engineer inquiring about Application 11125. The State Engineer responded on June 22, 1962 by confirming the validity of Applications 11125 and 11127. There is no record that this decision was challenged by Mr. Knudsen.

13. On September 25, 1986 and October 2, 1986, respectively, the Office of the State Engineer sent letters to Royce Wood, Petitioners' predecessor, reaffirming the validity of Applications 11125 and 11127. There is no record that these letters were challenged by Mr. Woods.

14. In the late 1990's, the following correspondence was exchanged between the Office of the State Engineer and the Hawks, the immediate predecessors in interest to the Petitioners, through their attorney John E. Marvel:

A. On August 19, 1997, Mr. Marvel wrote a letter to the Office of the State Engineer stating that the water rights adjudicated from Bishop and Burnt Creeks were erroneously transferred to Pacific Reclamation Water Company under Applications 11125 and 11127.

B. On or about March 19, 1998, Mr. Marvel filed with the Office of the State Engineer a Report of Conveyance,

seeking to transfer waters described in Applications 11125 and 11127 to the Hawks' lands.

C. On February 11, 1999, Mr. Lisa B. Schettler, an Engineering Technician with the Office of the State Engineer issued a written decision denying the Hawks' request to transfer the waters described in Applications 11125 and 11127 on the Hawks' property and reaffirming the validity of those Applications.

D. There is no record that this decision was challenged by the Hawks until May 25, 1999, when Mr. Marvel sent a letter to the State Engineer challenging the February 11, 1999 decision; however, no Petition for Judicial Review was filed with respect to this letter.

E. On June 15, 1999, Barbara Kightlinger, a Management Assistant with the Office of State Engineer, sent a letter to the Hawks that was contradictory to the February 11, 1999, in that it stated that the waters had been assigned to show the Hawks as the owners; however, this letter further stated that the decision was "subject to amendment upon receipt of additional information."

F. On July 19, 1999, Mrs. Kightlinger sent another letter to the Hawks rescinding the June 15, 1999 letter and upholding the validity of Application 11125, Certificate 2846 and Application 11127, Certificate 2848.

15. On August 18, 1999, Petitioners filed a Petition for Judicial Review from Order on Decision of State Engineer (NRS 533.450) challenging the decision of the Office of the State Engineer contained in the July 19, 1999 letter. It is the Second Amended Petition for Judicial Review of the Petitioners that is now before this Court.

CONCLUSIONS OF LAW

This Court makes the following conclusions of law:

1. In reviewing a Petition for Judicial Review of a decision of the State Engineer, the function of the court is to review the evidence upon which the State Engineer based his decision and ascertain whether that evidence supports the order. If so, the court is bound to sustain the Engineer's decision. *State Engineer v. Curtis Park*, 101 Nev. 30, 32, 692 P.2d 495 (1985).

State Engineer v. Curtis Park involved the issue of whether the district court, in reviewing a decision of the State Engineer on remand, properly acted within its authority in holding that the State Engineer abused his discretion in revoking certain temporary water permits. On appeal, the Supreme Court found that the district court abused its discretion by going beyond a review of the evidence relied upon by the State Engineer and actually usurped the State Engineer's power by rescinding the State Engineer's revocation order, reinstating the temporary well permits and making them permanent, and ordering the new permits to be expanded. In reversing the district court's decision and remanding the case for reinstatement of the State Engineer's revocation order, the Supreme Court stated:

> In [*Las Vegas Valley Water District v. Curtis Park*, 98 Nev. 275, 646 P.2d 549 (1982)], we held that the district court's review of the State Engineers revocation order is a limited judicial review for abuse of discretion. *Curtis Park*, 98 Nev. at 278, 646 P.2d at 551. "We decline[d] to rule on whether the record indicat[ed] an abuse of discretion by the State Engineer." Id. Rather, we determined the district court had no authority to

> grant equitable relief to the Curtis Park Homeowners Association, which has owned the temporary well permits for over twenty years before the water district could service that area.
>
> In support of our holding, we relied on the agency-specific judicial review provision of NRS 533.450, the Nevada Administrative Procedure Act non-contested case judicial review provision of NRS 233B.140(5), and our previous decision in *Revert v. Ray*, 95 Nev. 782.

Citing *Revert*, 95 Nev. at 786, 603 P.2d at 264, the *State Engineer v. Curtis Park* Court unequivocally states: "A district court is not free to substitute its judgment for that of the Engineer in granting and extending permanent water rights."

Further clarification of the standard of review of decisions of the State Engineer is provided in *State v. State Engineer*, 104 Nev. 709, 713, 766 P.2d 263 (1988). In *State v. State Engineer*, the Nevada Supreme Court recognizes the statutory requirement that "[t]he decision of the state engineer shall be prima facie correct, and the burden of proof shall be upon the party attacking the same." NRS 533.450(9). The Court goes on to state:

> We have previously held that "[a]n agency charged with the duty of administering an act is impliedly clothed with power to construe it as a necessary precedent to administrative action" and that "great deference should be given to the agency's interpretation when it is within the language of the statute." *Clark Co. Sch. Dist. v. Local Gov't*, 90 Nev. 442, 446, 530 P.2d 114, 117 (1974). While not controlling, an agency's interpretation of a statute is persuasive. *Nevada*

Power Co. v. Public Serv. Comm'n, 102 Nev. 1, 4, 711 P.2d 867, 869 (1986).

In sum, to prevail, the Petitioners in the instant case bear the burden of overcoming a presumption that the State Engineer's July 19, 1999 decision is correct. To do so, Petitioners must prove that the decision was not based on substantial evidence and was an abuse of discretion.

2. NRS 533.386, enacted in 1995, places strict limitations on the ability of the State Engineer to confirm reports of conveyance. Prior to the enactment of NRS 533.382 through 533.387, the State Engineer was often placed in the position of resolving title disputes affecting water rights. One result of the 1995 amendments was NRS 533.386, which provides:

> NRS 533.386 Duties of state engineer concerning conveyances.
>
> 1. The state engineer shall confirm that the report of conveyance required by paragraph (a) of subsection 1 of NRS 533.384 includes all material required by that subsection and that:
>
> (a) The report is accompanied by the prescribed fee;
>
> (b) *No conflict exists in the chain of title* that can be determined by the state engineer from the conveyance documents or from other information on file in the office of the state engineer; and
>
> (c) The state engineer is able to determine the rate of diversion and the amount of water conveyed in acre-feet or million gallons from the conveyance documents or from other information on file in the office of the state engineer.

2. *If the state engineer determines that the report of conveyance is deficient, he shall reject* the report of conveyance and return it to the person who submitted it with:

(a) An explanation of the deficiency; and

(b) A notice stating that the state engineer will not confirm a report of conveyance that has been rejected unless the report is resubmitted with the material required to cure the deficiency. The notice must also include a statement of the provisions of subsection 3.

3. The state engineer shall not consider or treat the person to whom:

(a) An application or permit to appropriate any of the public waters;

(b) A certificate of appropriation;

(c) An adjudicated or unadjudicated water right; or

(d) An application or permit to change the place of diversion, manner of use or place of use of water,

is conveyed as the owner or holder of the application, right, certificate or permit for the purposes of this chapter, including, without limitation, all advisements and other notices required of the state engineer and the granting of permits to change the place of diversion, manner of use or place of use of water, until a report of the conveyance is confirmed pursuant to subsection 1. [Emphasis added]

Significant here are sections 1 and 2 of NRS 533.386. Section 1 provides that the State Engineer shall confirm a

report of conveyance *unless* a "conflict exists in the chain of title that can be determined by the state engineer." Section 2 provides that if a report of conveyance is deficient, the State Engineer *shall* reject the report of conveyance. The intent of this provision was to take the State Engineer out of the position of resolving title disputes. Accordingly, if substantial evidence exists in the record to support the State Engineer's determination that Petitioners' report of conveyance should be reject because a conflict exists in the chain of title, then the State Engineer's decision must be upheld. In the present case, the State Engineer was presented with a conflict in the chain of title, since the records of the State Engineer's Office indicate the water right Petitioners sought to have confirmed was taken off their predecessors' lands through Applications 11125 and 11127. Therefore, the State Engineer's decision to reject Petitioners' report of conveyance must be upheld.

3. At all times relevant hereto, NRS 533.365(1) has contained the following requirements for protesting applications filed with the State Engineer:

> Any person interested may, within 30 days from the date of last publication of the notice of application, file with the state engineer a written protest against the granting of the application, setting forth with reasonable certainty the grounds of such protest, which shall be verified by the affidavit of the protestant, his agent or attorney.

Moreover, at all times relevant hereto, NRS 533.365(1) and (3), respectively, have contained the following requirements for appealing decisions of the State Engineer:

> 1. Any person feeling himself aggrieved by any order or decision of the state engineer, acting in person or through his assistants or the water commissioner, affecting his interests, when such order or decision relates to the administration of determined rights or is made pursuant to NRS 533.270 to 533.445, inclusive, may have the same reviewed by a proceeding for that purpose, insofar as may be in the nature of an appeal, which shall be initiated in the proper court of the county in which the matters affected or a portion thereof are situated; but on stream systems where a decree of court has been entered, the action shall be initiated in the court that entered the decree. Such order or decision of the state engineer shall be and remain in full force and effect unless proceedings to review the same are commenced in the proper court within 30 days following the rendition of the order or decision in question and notice thereof is given to the state engineer as provided in subsection 3.
>
> No such proceedings may be entertained unless notice thereof, containing a statement of the substance of the order or decision complained of, and of the manner in which the same injuriously affects the petitioner's interests, has been served upon the state engineer, personally or by registered or certified mail, at his office at the state capital within 30 days following the rendition of the order or decision in question. A similar notice shall also be served personally or by registered or certified mail upon the person or persons who may have been affected by such order or decision.

NRS 533.365(1) and NRS 533.365(1) and (3) are clear and unambiguous on their face. When statutes are clear and unambiguous, courts will not search for any meaning

beyond the language of the statute itself. *Hudson v. Warden*, 117 Nev., Advance Opinion 35 (2001), p.7. In the present case, the record shows that Respondent Pacific Reclamation Water Company published notices of Applications 11125 and 11127 in the Wells Progress, with last dates of publication of August 4, 1944. There is no indication in the record that any person filed a protest with the State Engineer within thirty days of the last date of publication, which would have been required under NRS 533.365(1) in order to challenge the Applications. The record further shows that both permits were granted on February 14, 1945. There is no indication in the record that, within thirty days of these decisions, any person served the State Engineer with notice of proceedings or commenced proceedings in the proper court, as was required under NRS 533.365(1) and (3). Accordingly, the State Engineer's decision automatically became final thirty days after Applications 11125 and 11127 were granted by operation of NRS 533.365(1).

Petitioners argue that questions of title to property may be asserted at any time and, therefore, these time limitations do not apply in the present case. It should be noted that the issue of title is not before this Court, only the decision contained in the July 19, 1999 letter from the State Engineer's Office to Petitioners' predecessor, which reaffirmed the granting of Applications 11125 and 11127 in 1945. Petitioners have presented to this Court documents purporting to show that the disputed water rights have passed by conveyance to the Petitioners through a chain of title dating back to the 1870's. While acknowledging that this Court is not being asked to quiet title to the Petitioners' property rights, Petitioners nevertheless assert that the State Engineer erred in not recognizing their chain of

title and granting the Petitioners' predecessors' request to transfer the waters described in Applications 11125 and 11127 onto their property.

Petitioners offer no authority for the proposition that aggrieved persons may circumvent the time limitations contained in NRS 533.365(1), and NRS 533.365(1) and (3), should the nature of dispute involve an issue of chain of title. No such exception appears in the language NRS Chapter 533 itself and, considering that the State Engineer was required to resolve chain, title disputes affecting water rights prior to legislative enactments in 1995 (discussed above), such an exception would seemingly thwart one of the primary purposes behind NRS Chapter 533, which is to allow the State Engineer to proceed as an administrative officer to hear contests concerning water rights and to control water rights in a river system. See generally *Pitt v. Scrugham*, 44 Nev. 418, 195 Pac. 1101 (1921); *Ormsby County v. Kearney*, 37 Nev. 314, 142 Pac. 803 (1914); *In re Waters of Manse Spring*, 60 Nev. 280, 108 P.2d 311 (1940); *In re Filippini*, 66 Nev. 17, 202 P.2d 535 (1949); *McCormick v. Sixth Judicial Dist. Court*, 69 Nev. 214, 246 P.2d 805 (1952). Moreover, such a result would render meaningless the time limitations contained in NRS 533.365(1), and NRS 533.365(1) and (3) and could open the door to challenges to an untold number of past decisions that have been issued by the Office of the State Engineer since the inception of that agency. This would have the effect of creating uncertainty as to the validity of many long-recognized water rights.

4. Pursuant to NRS 533.450, "[a]ny person feeling himself aggrieved" by an order or decision of the State Engineer has thirty days to appeal that decision. An appeal from an order or decision of the State Engineer is

in the nature of an appeal. *Revert v. Ray*, 95 Nev. 782, 786 603 P.2d 262, 264 (1979). Administrative appeals must be timely filed, otherwise they are barred. *Livingston School District v. Kennan*, 82 F.3d 912 (9th Cir. 1995) (holding that an administrative appeal brought outside a thirty day statutory appeal period should be dismissed); *see also Ross v. Giacomo*, 97 Nev. 550, 635 P.2d 298 (1981) (the 30-day filing period for appeals to the Supreme Court is jurisdictional, and an untimely appeal may not be considered).

Petitioners argue that the July 19, 1999 letter from Mrs. Kightlinger was a separate decision subject to judicial review pursuant to NRS 533.450, thereby reopening issues that could have been, but which were not, presented to this Court in 1945 within thirty days following the granting of Applications 11125 and 11127 by the Office of the State Engineer. Petitioners rely heavily on the language "any order or decision of the state engineer" that is contained in NRS 533.450(1) in support of this argument, stating that any letter containing a decision of the State Engineer may be subjected to judicial review.

Respondents argue that the July 19, 1999 letter was merely a reaffirmation of a much earlier decision and did not change the positions of the parties. Therefore, argue the Respondents, the July 19, 1999 letter did not re-subject the State Engineer's February 14, 1945 decision to grant Applications 11125 and 11127 to judicial review over fifty years after it was issued.

Petitioners' challenge to the issuance of Permits 11125 and 11127 by challenging the State Engineer's rejection of Petitioners' proposed report of conveyance is comparable to a motion filed with the district court or the supreme court to reconsider a decision that was made over fifty-five years

ago. Such a motion would be denied because it would be time-barred. In *Alvis v. State*, 99 Nev. 184, 660 P.2d 980 (1983), the Supreme Court considered whether the denial of a request for reconsideration was appealable. In *Alvis* the Court ruled that an order denying reconsideration was not appealable because it did not affect the rights of the parties, as they were determined in a final judgment. *Alvis*, 99 Nev. at 185, 660 P.2d at 981.

The record shows that the facts upon which the Petitioners assert their claim to the waters described in Applications 11125 and 11127 are the same facts that were known to the State Engineer in 1945 and, moreover, that the State Engineer's decision to reject the Petitioners' report of conveyance did not alter the positions of the parties. It is the determination of this Court that NRS 533.450(1) does not permit aggrieved parties to continually reset the thirty day time limitation contained in NRS 533.450 by repeatedly resubmitting the same issue to the State Engineer, as appears to have been done in this case. Such a result would allow any aggrieved person to revive a decision of the State Engineer any time that agency replied to an inquiry in a manner that the party deemed unsatisfactory, regardless of the passage of time, thereby negating the meaning and intent of these statutory time limitations.

JUDGMENT

Pursuant to the foregoing Findings of Fact and Conclusions of Law, and good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, for the reasons herein stated, Petitioners are procedurally barred pursuant to NRS 533.450(1) and

(3) from petitioning this Court for judicial review of the State Engineer's February 14, 1945 decision to grant Applications 11125 and 11127.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT a conflict exists in the chains of title of Petitioners and Respondent Pacific Reclamation Water Company, respectively, which prohibits the State Engineer from confirming Petitioners' report of conveyance pursuant to NRS 533.386; therefore, this Court sustains the State Engineer's decision to reject Petitioner's report of conveyance.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT the Petitioner's Second Petition for Judicial Review is dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT the parties shall each bear their own attorney fees and costs of suit.

DATED this 21st day of May, 2002.

/s/ Richard A. Wagner
HON. RICHARD WAGNER
DISTRICT COURT JUDGE

KENNY C. GUINN
Governor

R. MICHAEL TURNIPSEED, P.E.
State Engineer
WAYNE TESTOLIN
Supervising Water Commissioner

STATE OF NEVADA

[SEAL]

DEPARTMENT OF CONSERVATION
AND NATURAL RESOURCES

DIVISION OF WATER RESOURCES
850 Elm Street
Elko, Nevada 89801
(775) 753-1102 • Fax (775) 753-9483

July 19, 1999

RE: Humboldt River Proof 00608

William Robert Hawks, et. al.
% John E. Marvel
P.O. Box 2645
Elko, NV 89803

Dear Mr. Hawks:

This letter supersedes my letter to you dated June 15, 1999 (copy enclosed).

This letter rescinds the assignment of a portion of Humboldt River Proof 00608, being 349.29 acre feet appurtenant to 116.43 acres, to William Robert Hawks, Joyce Lee Hawks, William Roy Hawks and Greg Alan Hawks.

The records in the office of the State Engineer reflect that there are no water rights remaining in sections 1 and/or 2 of T.38N., R.61E. under Proof 00608. The only water rights appurtenant to land in these sections are Permits 21925 and 21950, Certificates 7853 and 7854. These are changes of Proofs 00608 and 00214, respectively, and are currently shown to be owned by Hawks, et. al.

This rescission is based on documentation submitted to and acted upon previously by the State Engineer (see letter to John E. Marvel, dated February 11, 1999, from Lisa Schettler of the Carson City office, (copy enclosed).

We apologize for the confusion. Lisa Schettler's February letter stands as written. If you have any questions, please contact this office.

Sincerely,

/s/ Barbara Kightlinger
Barbara Kightlinger,
Management Assistant II

cc: Carson City office

GRANT, BARGAIN AND SALE DEED TO JOINT TENANTS

THIS INDENTURE, made the 7th day of August, 1942, by and between ANNA E. BOND, a widow, of Niantic, Connecticut, party of the first part, and NORMAN J. BOND, WILLIAM G. BOND, STEPHEN H. BOND, HENRY W. BOND, FREDERICK DART BOND, FRANCIS B. BOND, MARIA E. BOND, NORMAN WILLIAM RYAN, ELIZA RYAN POST, ELIZABETH RYAN VOGEL, ESTHER RYAN and FREDERICK BOND DART, parties of the second part, by and through ANNA E. BOND, their Attorney-in-Fact, and ANNA E. BOND, as Guardian of the Estate of LOUIS HEALY BOND, a minor, party of the third part, granters, and ALONZO KNUDSEN AND CLAIR KNUDSEN of the County of Elko, State of Nevada, as joint tenants with right of survivorship, parties of the fourth part.

WITNESSETH:

THAT WHEREAS, the second parties by Letter of Attorney dated as of the first day of December, 1941, and duly executed and acknowledged by each and all of them, and duly recorded on the 20th day of April, 1942, in Book 3 of the Powers of Attorney, at pages 347 to 350 inclusive, of the records of the office of the County Recorder of the County of Elko, State of Nevada, duly made, constituted and appointed the said ANNA E. BOND as their lawful Attorney-in-Fact for the purposes hereinafter recited; and

WHEREAS, the said ANNA E. BOND was, by an order of the Fourth Judicial District Court of the State of Nevada, in and for the County of Elko, in the matter of the guardianship of the estate of LOUIS HEALY BOND, a

Minor, duly appointed and thereafter duly qualified as the Guardian of the Estate of said minor within the County of Elko, State of Nevada, and was thereafter duly authorized by said Court to sell and convey the interest of said minor in the property hereinafter described, and the said sale was thereafter duly and regularly confirmed by said court as more fully appears from the certified copy of the order of said court confirming said sale, duly recorded in the office of said County Recorder in Book 12 of Miscellaneous Records at page 338 et seq; now, therefore, in consideration of the premises and of the sum of One Dollar ($1.00) by the said fourth parties to each of the said first, second and third parties in hand paid, receipt whereof is hereby acknowledged, and other good and lawful consideration, the said first, second and third parties do by these presents, grant, bargain and sell unto the said fourth parties, as joint tenants and notes tenants in common, and to the survivor of them, and to the heirs, executors, administrators and assigns of the survivor, all those certain lots, pieces or parcels of land situate, lying and being in the County of Elko, State of Nevada, particularly described as follows, to-wit:

T. 38 N., R. 61 E.:

Sec. 3: All

2: SW¼ NE¼; E½ NW¼; SW¼ SE¼; SW¼ SW¼

1: NE¼ NW¼; N½ NW¼ NW¼; S½ SW¼

TOGETHER with all water rights, range rights and stockwatering rights appurtenant thereto or used or enjoyed in connection therewith.

TOGETHER with the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

TO HAVE AND TO HOLD, all and singular, the said real property, together with the appurtenances, unto the said parties of the fourth part, as joint tenants and not as tenants in common, and to the survivor of them, and to the heirs and assigns of survivor forever.

IN WITNESS WHEREOF, the said first, second and third parties have executed these presents the day and year first hereinabove written.

$.55 Internal Revenue Stamps attached and cancelled A.E.B. 8/7/42

ANNA E. BOND -
Anna E. Bond, First Party

NORMAN J. BOND -
Norman J. Bond

WILLIAM G. BOND -
William G. Bond

STEPHEN H. BOND -
Stephen H. Bond

HENRY W. BOND -
Henry W. Bond

FREDERICK DART BOND -
Frederick Dart Bond

FRANCIS B. BOND -
Francis B. Bond

MARIA E. BOND -
Maria E. Bond

NORMAN WILLIAM RYAN -
Norman William Ryan

ELIZA RYAN POST -
Eliza Ryan Post

ELIZABETH RYAN VOGEL
Elizabeth Ryan Vogel

FREDERICK BOND DART
Frederick Bond Dart
SECOND PARTIES

By: ANNA E. BOND -
Their Attorney-in-Fact

ANNA E. BOND -
Anna E. Bond, as
Guardian of the Estate of
LOUIS HEALY BOND, a Minor,
THIRD PARTY

STATE OF CONNECTICUT,)
) SS.
COUNTY OF NEW LONDON)

On this 7th day of August, 1942, personally appeared before me, a Notary Public in and for said County and State, ANNA E. BOND, known to me to be the person described in and who executed the foregoing instrument, who acknowledged to me that she executed the same freely and voluntarily and for the uses and purposes therein mentioned; and also known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-Fact of NORMAN J. BOND, WILLIAM G. BOND, STEPHEN H. BOND, HENRY W. BOND, FREDERICK DART BOND, FRANCIS B. BOND, MARIA E. BOND, NORMAN WILLIAM RYAN, ELIZA RYAN POST, ELIZABETH RYAN VOGEL, ESTHER

RYAN, FREDERICK BOND DART, and acknowledged to me that she subscribed the names of the said NORMAN J. BOND, WILLIAM G. BOND, STEPHEN H. BOND, HENRY W. BOND, FREDERICK DART BOND, FRANCIS B. BOND, MARIA E. BOND, NORMAN WILLIAM RYAN, ELIZA RYAN POST, ELIZABETH RYAN VOGEL, ESTHER RYAN and FREDERICK BOND DART, as principals, and her own name as Attorney-in-Fact, freely and voluntarily and for the uses and purposes therein mentioned; and also known to me to be the person described in and who executed said instrument as the guardian of the Estate of Louis Healy Bond, a Minor, and acknowledged to me that she executed the same as such guardian pursuant to authorization of court, as therein recited, freely and voluntarily and for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal
[SEAL] the day and year in this certificate last above written.

GEORGE F. CRAMER

Notary Public.

Filed for record at request of Nevada Bank of Commerce on the 22 day of Dec. 1942 at 4:10 o'clock P.M.

Gertrude M. Williams, County Recorder
by Violate Salis, Deputy

Source–Bishop and Burnt Creeks.
Ditch–Nos. 5 and 6.

1876	147.44	.....	.....	E½ SW¼	2	38	61				
				SE¼	2	38	61				
				SE¼ NE¼	2	38	61				
				W½ SW¼	1	38	61				
				SW¼ SW¼	1	38	61	4-15–	8-15	1.814	442.32

NEVADA COMPILED LAWS 1929

CONTAINING ALL STATUTES OF A GENERAL NATURE ENACTED BY THE LEGISLATURE OF THE STATE OF NEVADA FROM 1861 TO 1929, INCLUSIVE, TOGETHER WITH ANNOTATIONS FROM THE DECISIONS OF THE SUPREME COURT OF NEVADA CONTAINED IN VOLUMES 1 TO 51, INCLUSIVE, OF THE NEVADA REPORTS AND FROM ALL DECISIONS OF THE COURTS OF THE UNITED STATES CONSTRUING NEVADA STATUTES.

ALSO A DIGEST OF NEVADA REPORTS, VOLUMES 33-51

IN SIX VOLUMES

VOLUME III

(SECTIONS 5650 TO 8358)

COMPILED AND ANNOTATED

BY

CURTIS HILLYER

SAN FRANCISCO

BENDER-MOSS COMPANY

LAW PUBLISHERS AND BOOKSELLERS

1930

* * *

§ 7944. METHOD OF APPROPRIATION. § 59. Any corporation authorized to do business in this state, or any citizen of the United States, or any person who has

legally declared his intention to become such, over the age of twenty-one years, desiring to appropriate any of the public waters, or to change the place of diversion, manner of use or place of use of water already appropriated, shall, before performing any work in connection with such appropriation, change in place of diversion or change in manner or place of use, make an application to the state engineer for a permit to make the same; *provided*, that any person under the age of twenty-one years who has served or shall hereafter serve in the army of the United States during the present emergency shall be entitled to the same rights hereunder as others over twenty-one years of age possess; *provided further*, that no assignment of any water permit or application shall be valid for any purpose unless made to one authorized hereunder to acquire the same in the first instance.

No application shall be for the water of more than one source to be used for more than one purpose; *provided, however*, that individual domestic use may be included in any application with the other use named. Each application for a permit to appropriate water shall contain the following information:

(a) The name and postoffice address of the applicant, and if the applicant be a corporation, the date and place of incorporation.

(b) The name of the source from which the appropriation is to be made.

(c) The amount of water which it is desired to appropriate, expressed in terms of cubic feet per second, except in application for permit to store water, where the amount shall be expressed in acre-feet.

(d) The purpose for which the application is to be made.

(e) A substantially accurate description of the location of the place at which the water is to be diverted from its source, and if any of such water is to be returned to the source, a description of the location of the place of return.

(f) A description of the proposed works.

(g) The estimated cost of such works.

(h) The estimated time required to construct said works, and the estimated time required to complete the application of the water to beneficial use.

(j) The signature of the applicant or his properly authorized agent.

In addition to the foregoing, the application shall contain, if for irrigation purposes, except in case of application for permit to store water, the number of acres to be irrigated and a description by legal subdivisions, where possible, of the lands to be irrigated; if for power purposes, the vertical head under which the water will be applied, the location of the proposed power-house, and, as near as may be, the use to which the said power is to be applied; if for municipal supply, or for domestic use, the approximate number of persons to be served, and the approximate future requirement; if for mining purposes, the proposed method of applying and utilizing the water; if for stock-watering purposes, the approximate number and character of animals to be watered; if for any purpose contemplating the storage of waters, in addition to the information required in applications naming the said purpose, it shall give the dimensions and location of the

proposed dam, the capacity of the proposed reservoir and a description of the land to be submerged by the impounded waters. Every application for permit to change the place of diversion, manner of use or place of use of water already appropriated, shall contain such information as may be necessary to a full understanding of the proposed change as may be required by the state engineer. All applications for permit shall be accompanied or followed by such maps and drawings and such other data as may hereafter be prescribed by the state engineer, and such accompanying data shall be considered as part of the application. *As mended, Stats. 1919, 71.*

* * *

§ 7946. NOTICE OF APPLICATION TO BE PUBLISHED. § 61. When any application is filed in compliance with this act the state engineer shall, within thirty (30) days, at the expense of the applicant, to be paid in advance as herein provided, publish or cause to be published, in some newspaper having a general circulation, and printed and published in the county where such water is sought to be appropriated, a notice of the application which shall set forth that said application has been filed, the date of said filing, the name and address of the applicant, the name of the source from which the appropriation is to be made, the location of the place of diversion, and the purpose for which said water is to be appropriated, to which shall be added by the publisher the

date of first publication, and the date of last publication. Upon proof of such publication, which must be filed within thirty (30) days from the date of the last publication, the state engineer shall pay for the same from the moneys deposited by the applicant for such purpose; *provided, however*, that if the application is canceled for any reason before it is published the fee of twelve and one-half ($12.50) dollars, collected for said publication, shall be returned by the state engineer to said applicant. *As amended, Stats. 1925, 121.*

§ 7947. PROTESTS, HOW CONDUCTED. § 62. Any person interested may, within thirty (30) days from the date of last publication of the said notice of application, filed with the state engineer a written protest against the granting of said application, setting forth with reasonable certainty the grounds of such protest, which shall be verified by the affidavit of the protestant, his agent or attorney. On receipt of a protest, as hereinbefore provided, it shall be the duty of the state engineer to advise the applicant whose application has been protested of the fact that said protest has been filed with him, which advice shall be sent by registered mail. The state engineer shall duly consider the said protest, and may, in his discretion, hold hearings and require the filing of such evidence as he may deem necessary to a full understanding of the rights involved; *provided, however*, that no hearing thereon shall be had except after due notice by registered mail to both the applicant and protestant, which notice shall give the time and place at which the said hearing is to be held, which notice shall be mailed at least fifteen days prior to the date set for said hearing. Said hearings shall be conducted under such rules and regulations as the state engineer may make, which he is hereby empowered to

make for the proper and orderly exercise of the powers conferred herein.

§ 7948. TO APPROVE APPLICATIONS, WHEN. — FEES RETURNED, WHEN. — PROVISO. — RECORD OF ACTION. § 63. It shall be the duty of the state engineer to approve all applications made in proper form where all fees, as in this act provided, have been paid, which contemplate the application of water to beneficial use, and where the proposed use or change does not tend to impair the value of existing rights, or be otherwise detrimental to the public welfare. But where there is no unappropriated water in the proposed source of supply, or where its proposed use or change conflicts with existing rights, or threatens to prove detrimental to the public interests, it shall be the duty of the state engineer to reject said application and refuse to issue the permit asked for. Should the state engineer refuse to issue said permit, or should the permit be issued for a less amount of water than named in the application, the state engineer shall return to the applicant the amount of the deposit for such water rights, or the balance of the amount of the deposit for which the permit was denied; *provided, however*, the fee of fifteen dollars ($15) for examining, filing and publishing said application shall not be included in the amount returned, except as herein provided.

The refusal or approval of an application shall be endorsed on a copy of the original application, and a record made of such endorsement in the records of the office of the state engineer; said copy of the application so endorsed shall be returned to the applicant. If approved, the applicant shall be authorized, on receipt thereof, to proceed with the construction of the necessary works and to take all steps required to apply the water to beneficial use and

to perfect the proposed appropriation. If the application is refused, the applicant shall take no steps toward the prosecution of the proposed work or the diversion and use of the public water so long as such refusal shall continue in force.

* * *

§ 7970. VESTED RIGHTS NOT IMPAIRED. § 84. Nothing in this act contained shall impair the vested right of any person to the use of water, nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this act where appropriations have been initiated in accordance with law prior to the approval of this act. Any and all appropriations based upon applications and permits now in file in the state engineer's office, shall be perfected in accordance with the laws in force at the time of their filing.

Serial No. 11125

APPLICATION FOR PERMISSION TO CHANGE POINT OF DIVERSION, MANNER OF USE AND PLACE OF USE OF THE PUBLIC WATERS OF THE STATE OF NEVADA HERETOFORE APPROPRIATED.

Date of first receipt and filing in State Engineer's Office JUN 14 1944

Returned to applicant for correction _____

Corrected application filed _____

The undersigned Pacific Reclamation Water Company (Name of applicant) of Metropolis, County of Elko State of Nevada, hereby makes application for permission to change the point of diversion and manner and place of use of water heretofore appropriated under Vested Right Proof No. 00608Edwards decree pages 80-81 and 104. (State nature of right that is the basis of this application, i.e., vested, decreed or permitted right.)

---

1. The source of water supply is Bishop Creek.

2. The quantity of water desired to be changed 6.320 c.f.s. (Acre feet, second feet.)

3. The water is to be used for irrigation purposes.

4. The water heretofore used for irrigation

5. Place of use under existing appropriation Portions of Secs. 28, 29 31 and 32 T.39 N., R. 62 E., and portions of Secs. 1 and 2 T. 38 N., R. 61 E., 513.62 Acres. (See Edwards Decree pages 80-81 and 104) (Under irrigation give

number acres and description in respect to Government Land Survey; Under any other use give location as being within a 40-acre subdivision.)

6. Proposed place of use under this application all or portions of Secs. 18, 19, 28,29,30,31,32,T.39N.,R.62 E., & Secs. 13,14, 15,22,23,24,25,T.39N.,R.61E., M.D.M. (See Cultural Map) (Under irrigation give number acres and description in respect to Government Land Survey; Under any other use give location as being within a 40-acre subdivision.)

7. The water is to be diverted from its source at the following point: NW¼NE¼ Sec. 27, T.39N.,R.62 E., or at a point which bears N 15° 05' E., 4285 feet from the S¼ Cor. of said Sec. 27. (Describe being within a 40-acre subdivision of public survey or by course and distance to a section corner.)

8. The existing point of diversion under the former appropriation is as follows: NW¼SW¼ Sec. 1, T.38N., R. 61 E; SW¼ SW¼ Sec. 31, T. 39 N.,R. 62E.,; SW¼NW¼ Sec. 27 and NW¼SE¼ Sec. 28, T. 39 N., R. 62E. (If point of diversion is not changed do not answer.)

9. Number and kind of animals proposed to be watered _____

_____

10. Use will begin about April (Month) and end about August (Month) of each year.

11. The water has been used heretofore during the months of April to August, inc. of each year

12. Remarks Former places of use and points of diversion taken from decree and Proof No. 00608 on file in Winnemucca, Nevada. Right listed page 81 Edwards under Bishop and Burnt Creek shows by Proofs 31.01 Acres irrigated from Burnt Creek and remainder irrigated from Bishop Creek.

REMARKS

The present applicant, PACIFIC RECLAMATION WATER COMPANY, and its stockholders have acquired all of the property rights, including the land and water rights owned by Pacific Reclamation Company, so far as the same pertain to the said water rights. The permission herein sought is for the purpose of enabling applicant and its stockholders more scientifically and economically to administer and conduct the entire system for the development, cultivation and irrigation of lands, and to conserve the water for the benefit of all stockholders of applicant, and particularly those to change the point of diversion and place of use of the waters of Bishop Creek, Johnson Creek, Burnt Creek and Trout Creek and certain springs, to the end that all of the waters in all of said creeks and springs shall become a part of the entire water available for irrigation of the entire amount of lands herein described as the lands to be irrigated hereunder, and to the end that the waters of Burnt Creek, Trout Creek and certain springs, which do not flow into the reservoir above the impounding dam, shall flow into the main canal and supplement all rights to divert water from said canal out of the stored waters of Bishop Creek and Johnson Creek, and out of the waters available under the vested rights from Bishop Creek and Johnson Creek, and to the further end that any of the stockholders of applicant, receiving the waters of Burnt Creek, Trout Creek and springs under this and similar applications made separately for such other creeks, shall be entitled to supplemental waters released from said reservoir through said canal to an aggregate extent, respectively, equaling the respective rights to which each applicant is entitled.

This application is to be considered in connection with proofs of appropriation and maps accompanying same, heretofore filed in the office of the State Engineer, concerning the waters of the above mentioned streams and the use thereof by the predecessors in interest of applicant (see partial proof of application to beneficial use filed November 28, 1919, by Metropolis Land Company,) and also in connection with maps and proofs filed and to be filed hereunder.

Upon final approval of this application, and similar applications for the other streams mentioned, and upon filing acceptance and final approval of the maps and proof of appropriation and application of water to beneficial use, and the issuance of appropriate certificates thereunder, applications for permission to change point of diversion, Serial numbers 4101, 4102, 4103 and 4104 may be deemed withdrawn. This and accompanying applications will be authority to the State Engineer to enter such withdrawal upon the issuance of the several certificates, etc., above mentioned.

The proof of beneficial use of water to which these remarks are likewise appended will apply technically to application No. 1807, filed September 1, 1910, but which is to retain the priority of application No. 1000 filed June 5, 1908, to which application No. 1807 is supplementary.

Proofs Nos. 00608, 00608A, 00608B and 00608C to which these remarks are appended, refer to numbers appearing in what is known as the "Edwards Decree", appearing at pages 81 and 82 of "the Humboldt River Adjudication, 1923 to 1938", as tied to the original proofs and files in the office of the County Clerk of Humboldt County, Winnemucca, Nevada.

These proofs and applications are made by the applicant, Pacific Reclamation Water Company, a Nevada Corporation, pursuant to contract dated December 28, 1910, between the State of Nevada and Pacific Reclamation Company. For the purpose of avoiding the necessity of considering that entire document (which is a voluminous one) reference is hereby made to the pertinent articles thereof to indicate the propriety of the making of this proof in the name of Pacific Reclamation Water Company.

The contract of December 28, 1910 (a copy of which is on file in the office of the State Engineer, and has been approved by the State Engineer), after preliminary recitals, recites the obligation of Pacific Reclamation Company to construct the dam, canals, etc: Article 2 contains general provisions, definitions, etc. Article 3 deals mainly with rights of way. Article 4 refers to the appropriations of water made under Applications Nos. 1000 and 1807 and deals with the duty of water on different classes of lands, etc. Article 5 provides for the opening of lands to entry by the state. Article 6 provides for the approval of land applications by the state only upon submission in each case of a water purchase contract for irrigation of such land. It further provides that the Pacific Reclamation Company to the extent of the capacity of its irrigation works and water rights will, as rapidly as lands are opened for entry, sell water to qualified entry men without preference, and that there shall not be any priority of water rights as between the various water purchasers. Article 7 provides for the sale of lands by the state to persons filing on the same.

Article 8 fixes the price of water rights and the method of sale thereof in considerable detail. Article 9 reads in part as follows:

"It being necessary to provide a convenient method of transferring the ownership and control of said canal and irrigation works from the said party of the second part herein to the purchasers of said water rights in said canal and for determining their rights among themselves and between said purchasers and the party of the second part herein, for the purpose of operating and maintaining said canal during the period of construction and afterwards and for the purpose of levying and collecting tolls, charges and assessments in the carrying on and maintaining of said canal and the management and operation thereof, it is hereby provided that, as soon as practicable after the execution of this contract, a corporation to be known as the Pacific Reclamation Water Company shall be formed at the expense of the party of the second part, the Articles of Incorporation of said company to be in the form approved by the Attorney General of the State of Nevada, a copy of which approved articles is hereto attached, marked "Schedule "B" and made a part hereof; that the authorized capital stock of said corporation shall be twenty-five thousand (25,000) shares of a per value of one dollar ($1.00) each, which amount is intended to represent one share for each acre of land which may hereafter be irrigated from said canal and irrigation system. The entire authorized amount of the capital stock of said corporation shall be delivered to the party of the second part herein in consideration of the covenants and agreements herein contained in order to enable it to deliver to purchasers of water rights the shares of stock evidenced and accompanying the same.

At the time of the purchase of any water right there shall be issued to the purchaser thereof one

> share of the capital stock of said water company corporation for each acre of land entered or filed upon or purchased . . .
>
> The said Pacific Reclamation Water Company shall have the management and control, as above set out, subject to the terms of a contract with the Pacific Reclamation Company, and approved by the State Land Register, of the said irrigation system as fast as the same is completed and turned over to it for operation by the said party of the second part as hereinafter provided. Whenever it is certified by the Chief Engineer of the party of the second part and the State Engineer that certain portions of the said irrigation system are completed for the purpose of operation, the same shall with the consent of the State Land Register be turned over to be controlled by the said Pacific Reclamation Water Company for operation, and said last named company shall thereupon take possession of and operate the same . . . "

Article 10 is entitled "Water right dedicated". It provides that the certificates of stock define the interest of the holder in the irrigation system on the basis of the duty of water defined in the contract, provides for measurement of the water, the adopting of rules and regulations, the rotation of use, etc., subject to the approval of the State Engineer. It then provides as follows:

> "The sale of the water rights to the purchaser shall be a dedication of the water to the lands to which the same is to be applied, such water right to be a part of and to relate to the water right belonging to said irrigation system."

Article 11 deals with the measurement and delivery of water and the charges therefor. The company is to construct the headgates, flumes, weirs, etc., for the control of the main canal, and the settler is to furnish his own gate and measuring device for his own diversion, etc. The State Engineer is to approve all plans. The Pacific Reclamation Water Company is authorized to assess a per acre charge not exceeding fifty cents to the purchasers of water.

Article 12 has provisions for the completion of the system, and for changes and alterations, etc. Articles 13 recites the basis for the water changes. Article 14 refers to description of lands under the Carey Act. etc. Article 15 provides for roads along section lines.

Article 16 is entitled "Delivery of water to users" and reads as follows:

> "It is agreed that the said Pacific Reclamation Water Company shall not deliver water to or permit the use thereof from said irrigation system by persons who have not purchased water rights or who are not holders of stock in said Pacific Reclamation Water Company."

Article 17 reserves the right to sell or mortgage. Article 18 is entitled "Quit Claim by Second Party", and reads as follows:

> "When full payment shall have been made to the party of the second part, its successors or assigns, for each and every of the water rights sold, said party of the second part, its successors or assigns, shall quit claim to said Pacific Reclamation Water Company all its right, title, claim or interest in and to the said irrigation system and appurtenances, including reservoir or reservoirs,

> dams, main and lateral canals, ditches, headgates, and any and all rights, privileges, and franchises pertaining thereto or connected therewith, free from any and all liens or encumbrances created by said party of the second part, or its successors or assigns".

Under Article 19 Pacific Reclamation Company guarantees the fulfillment of the water contracts by Pacific Reclamation Water Company, "such responsibility to cease as to each purchaser of water contracts when contract is fully paid". Article 19 further reads as follows:

> "Owners of cash contracts shall, as soon as water shall be ready for delivery to use upon said lands, and upon the surrender and cancellation of the contracts held by them, respectively, receive full paid shares of the capital stock of the Pacific Reclamation Water Company for the number of shares paid for in full to said company, the water represented by said shares to be and remain dedicated and attached to the particular tract of land described in such cash contracts and certificates for shares".

Article 20 provides for amending the contract by consent.

By reason of the foregoing provisions of said contract, the rights to be vested in said Pacific Reclamation Water Company, under this and accompanying applications and proofs will be administered and distributed to the stockholders of Pacific Reclamation Water Company, in accordance with the Articles of Incorporation, By-Laws, rules and regulations of that company, and in accordance with said contract.

All water rights, vested or to be vested, in Pacific Reclamation Water Company, by reason of the said proofs and

applications are hereby specifically acknowledged and declared to be subject to all valid liens by way of mortgage, contract or otherwise, of record in the County of Elko, State of Nevada, against any of the water rights so vesting, and likewise subject to the lien created by any valid existing pledge or hypothecation of any of the shares of stock of said Pacific Reclamation Water Company, and subject to any valid subsisting contract of sale involving such water rights or any part thereof, or involving any of such shares of stock; and particularly without prejudice to the rights of Co-Operative Security Corporation as the holder of certain properties and/or certificate of stock and/or contracts of sale as security for the repayment to said Co-Operative Security Corporation of certain indebtednesses on the part of one or more stockholders of said Pacific Reclamation Water Company, or on the part of any other persons.

13. Description of proposed work dam and canal system per maps and plans on file

14. Estimated cost of works work completed

15. Estimated time required to construct the works is work completed

PACIFIC RECLAMATION
WATER COMPANY Applicant
By /s/ Milton B. Badt
Milton B. Badt

OF STATE ENGINEER

Serial No. 11127

APPLICATION FOR PERMISSION TO CHANGE POINT OF DIVERSION, MANNER OF USE AND PLACE OF USE OF THE PUBLIC WATERS OF THE STATE OF NEVADA HERETOFORE APPROPRIATED.

Date of first receipt and filing in State Engineer's Office JUN 14 1944

Returned to applicant for correction _____

Corrected application filed _____

The undersigned Pacific Reclamation Water Company (Name of applicant) of Metropolis, County of Elko State of Nevada, hereby makes application for permission to change the point of diversion and manner and place of use of water heretofore appropriated under Vested Right Proof No. 00608B Edwards decree page 81 (State nature of right that is the basis of this application, i.e., vested, decreed or permitted right.)

---

1. The source of water supply is Burnt Creek.

2. The quantity of water desired to be changed 1.375 c.f.s. (Acre feet, second feet.)

3. The water is to be used for irrigation purposes.

4. The water heretofore used for irrigation

5. Place of use under existing appropriation W½SW¼; SW¼NW¼;SE¼NW¼;NE¼SW¼ all in Sec. 25,T. 39 N., R. 61E and NE¼SW¼;SE¼SW¼ all in Sec. 2, T. 38N., R. 61 E., (111.85A); Proof No. 00608B* Rights segregated from

work sheets on file at Winnemucca. (Under irrigation give number acres and description in respect to Government Land Survey; under any other use give location as being within a 40-acre subdivision.)

6. Proposed place of use under this application all or portions of Secs. 18, 19, 28,29,30,31,32,T. 39N.,R. 62 E., & Secs. 13,14,15,22, 23,24,25,T.39N., R. 61E., M.D.M. (See Cultural Map) (Under irrigation give number of acres and description in respect to Government Land Survey; under any other use give location as being within a 40-acre subdivision.)

7. The water is to be diverted from its source at the following point: SW¼NE¼ Sec. 13, T. 39 N., R.61 E., or at a point which bears N 34° 10' W. 3255 ft. from the S.E. Cor. of said Sec. 13. (Describe as being within a 40-acre subdivision of public survey or by course and distance to a section corner.)

8. The existing point of diversion under the former appropriation is as follows: NW¼NW¼ and SW¼NW¼ Sec. 25 T. 39 N., R. 61E.; SE¼NE¼ Sec. 2, T. 38 N., R. 61E. (If point of diversion is not changed do not answer.)

9. Number and kind of animals proposed to be watered _____

_____

10. Use will begin about April (Month) and end about August (Month) of each year.

11. The water has been used heretofore during the months of April to August, inc. of each year

12. Remarks Burnt & Spring Creek-26.83 Acres or o.33 c.f.s. under Proof No. 00608D previously transferred (Spring Creek). This application is made to transfer the waters of Burnt Creek (Proof No. 00608B). The rights are

listed in the Edwards Decree Page 81 under headings. Burnt Creek & Spring Creek Ditches Nos. 1,2,3 (80.84 A.) and Bishop and Burnt Creek Ditches Nos. 5 and 6 (31.01A). Segregation made from proofs and work sheets on file in Winnemucca, Nevada.

REMARKS

The present applicant, PACIFIC RECLAMATION WATER COMPANY, and its stockholders have acquired all of the property rights, including the land and water rights owned by Pacific Reclamation Company, so far as the same pertain to the said water rights. The permission herein sought is for the purpose of enabling applicant and its stockholders more scientifically and economically to administer and conduct the entire system for the development, cultivation and irrigation of lands, and to conserve the water for the benefit of all stockholders of applicant, and particularly those to change the point of diversion and place of use of the waters of Bishop Creek, Johnson Creek, Burnt Creek and Trout Creek and certain springs, to the end that all of the waters in all of said creeks and springs shall become a part of the entire water available for irrigation of the entire amount of lands herein described as the lands to be irrigated hereunder, and to the end that the waters of Burnt Creek, Trout Creek and certain springs, which do not flow into the reservoir above the impounding dam, shall flow into the main canal and supplement all rights to divert water from said canal out of the stored waters of Bishop Creek and Johnson Creek, and out of the waters available under the vested rights from Bishop Creek and Johnson Creek, and to the further end that any of the stockholders of applicant, receiving the waters of Burnt Creek, Trout Creek and springs under

this and similar applications made separately for such other creeks, shall be entitled to supplemental waters released from said reservoir through said canal to an aggregate extent, respectively, equaling the respective rights to which each applicant is entitled.

This application is to be considered in connection with proofs of appropriation and maps accompanying same, heretofore filed in the office of the State Engineer, concerning the waters of the above mentioned streams and the use thereof by the predecessors in interest of applicant (see partial proof of application to beneficial use filed November 28, 1919, by Metropolis Land Company,) and also in connection with maps and proofs filed and to be filed hereunder.

Upon final approval of this application, and similar applications for the other streams mentioned, and upon filing acceptance and final approval of the maps and proof of appropriation and application of water to beneficial use, and the issuance of appropriate certificates thereunder, applications for permission to change point of diversion, Serial numbers 4101, 4102, 4103 and 4104 may be deemed withdrawn. This and accompanying applications will be authority to the State Engineer to enter such withdrawal upon the issuance of the several certificates, etc., above mentioned.

The proof of beneficial use of water to which these remarks are likewise appended will apply technically to application No. 1807, filed September 1, 1910, but which is to retain the priority of application No. 1000 filed June 5, 1908, to which application No. 1807 is supplementary.

Proofs Nos. 00608, 00608A, 00608B and 00608C to which these remarks are appended, refer to numbers appearing

in what is known as the "Edwards Decree", appearing at pages 81 and 82 of "the Humboldt River Adjudication, 1923 to 1938", as tied to the original proofs and files in the office of the Country Clerk of Humboldt County, Winnemucca, Nevada.

These proofs and applications are made by the applicant, Pacific Reclamation Water Company, a Nevada Corporation, pursuant to contract dated December 28, 1910, between the State of Nevada and Pacific Reclamation Company. For the purpose of avoiding the necessity of considering that entire document (which is a voluminous one) reference is hereby made to the pertinent articles thereof to indicate the propriety of the making of this proof in the name of Pacific Reclamation Water Company.

The contract of December 28, 1910 (a copy of which is on file in the office of the State Engineer, and has been approved by the State Engineer), after preliminary recitals, recites the obligation of Pacific Reclamation Company to construct the dam, canals, etc: Article 2 contains general provisions, definitions, etc. Article 3 deals mainly with rights of way. Article 4 refers to the appropriations of water made under Applications Nos. 1000 and 1807 and deals with the duty of water on different classes of lands, etc. Article 5 provides for the opening of lands to entry by the state. Article 6 provides for the approval of land applications by the state only upon submission in each case of a water purchase contract for irrigation of such land. It further provides that the Pacific Reclamation Company to the extent of the capacity of its irrigation works and water rights will, as rapidly as lands are opened for entry, sell water to qualified entry men without preference, and that there shall not be any priority of water rights as between the various water

purchasers. Article 7 provides for the sale of lands by the state to persons filing on the same.

Article 8 fixes the price of water rights and the method of sale thereof in considerable detail. Article 9 reads in part as follows:

> "It being necessary to provide a convenient method of transferring the ownership and control of said canal and irrigation works from the said party of the second part herein to the purchasers of said water rights in said canal and for determining their rights among themselves and between said purchasers and the party of the second part herein, for the purpose of operating and maintaining said canal during the period of construction and afterwards and for the purpose of levying and collecting tolls, charges and assessments in the carrying on and maintaining of said canal and the management and operation thereof, it is hereby provided that, as soon as practicable after the execution of this contract, a corporation to be known as the Pacific Reclamation Water Company shall be formed at the expense of the party of the second part, the Articles of Incorporation of said company to be in the form approved by the Attorney General of the State of Nevada, a copy of which approved articles is hereto attached, marked "Schedule "B" and made a part hereof; that the authorized capital stock of said corporation shall be twenty-five thousand (25,000) shares of a per value of one dollar ($1.00) each, which amount is intended to represent one share for each acre of land which may hereafter be irrigated from said canal and irrigation system. The entire authorized amount of the capital stock of said corporation shall be delivered to the party of the second part herein

> in consideration of the covenants and agreements herein contained in order to enable it to deliver to purchasers of water rights the shares of stock evidenced and accompanying the same.
>
> At the time of the purchase of any water right there shall be issued to the purchaser thereof one share of the capital stock of said water company corporation for each acre of land entered or filed upon or purchased . . .
>
> The said Pacific Reclamation Water Company shall have the management and control, as above set out, subject to the terms of a contract with the Pacific Reclamation Company, and approved by the State Land Register, of the said irrigation system as fast as the same is completed and turned over to it for operation by the said party of the second part as hereinafter provided. Whenever it is certified by the Chief Engineer of the party of the second part and the State Engineer that certain portions of the said irrigation system are completed for the purpose of operation, the same shall with the consent of the State Land Register be turned over to be controlled by the said Pacific Reclamation Water Company for operation, and said last named company shall thereupon take possession of and operate the same . . . "

Article 10 is entitled "Water right dedicated". It provides that the certificates of stock define the interest of the holder in the irrigation system on the basis of the duty of water defined in the contract, provides for measurement of the water, the adopting of rules and regulations, the rotation of use, etc., subject to the approval of the State Engineer. It then provides as follows:

> "The sale of the water rights to the purchaser shall be a dedication of the water to the lands to which the same is to be applied, such water right to be a part of and to relate to the water right belonging to said irrigation system."

Article 11 deals with the measurement and delivery of water and charges therefor. The company is to construct the headgates, flumes, weirs, etc., for the control of the main canal, and the settler is to furnish his own gate and measuring device for his own diversion, etc. The State Engineer is to approve all plans. The Pacific Reclamation Water Company is authorized to assess a per acre charge not exceeding fifty cents to the purchasers of water.

Article 12 has provisions for the completion of the system, and for changes and alterations, etc. Articles 13 recites the basis for the water changes. Article 14 refers to description of lands under the Carey Act. etc. Article 15 provides for roads along section lines.

Article 16 is entitled "Delivery of water to users" and reads as follows:

> "It is agreed that the said Pacific Reclamation Water Company shall not deliver water to or permit the use thereof from said irrigation system by persons who have not purchased water rights or who are not holders of stock in said Pacific Reclamation Water Company."

Article 17 reserves the right to sell or mortgage. Article 18 is entitled "Quit Claim by Second Party", and reads as follows:

> "When full payments shall have been made to the party of the second part, its successors or assigns, for each and every of the water rights sold, said party of the second part, its successors or

> assigns, shall quit claim to said Pacific Reclamation Water Company all its right, title, claim or interest in and to the said irrigation system and appurtenances including reservoir or reservoirs dams, main and lateral canals, ditches, headgates, and any and all rights, privileges, and franchises pertaining thereto or connected therewith, free from any and all liens or encumbrances created by said party of the second part, or its successors or assigns".

Under Article 19 Pacific Reclamation Company guarantees the fulfullment of the water contracts by Pacific Reclamation Water Company, "such responsibility to cease as to each purchaser of water contracts when contract is fully paid". Article 19 further reads as follows:

> "Owners of cash contracts shall, as soon as water shall be ready for delivery to use upon said lands, and upon the surrender and cancellation of the contracts held by them, respectively, receive full paid shares of the capital stock of the Pacific Reclamation Water Company for the number of shares paid for in full to said company, the water represented by said shares to be and remain dedicated and attached to the particular tract of land described in such cash contracts and certificates for shares".

Article 20 provides for amending the contract by consent.

By reason of the foregoing provisions of said contract, the rights to be vested in said Pacific Reclamation Water Company, under this and accompanying applications and proofs will be administered and distributed to the stockholders of Pacific Reclamation Water Company, in accordance with the Articles of Incorporation, By-Laws, rules and regulations of that company, and in accordance with said contract.

All water rights, vested or to be vested, in Pacific Reclamation Water Company, by reason of the said proofs and applications are hereby specifically acknowledged and declared to be subject to valid liens by way of mortgage, contract or otherwise, of record in the County of Elko, State of Nevada, against any of the water rights so vesting, and likewise subject to the lien created by any valid existing pledge or hypothecation of any of the shares of stock of said Pacific Reclamation Water Company, and subject to any valid subsisting contract of sale involving such water rights or any part thereof, or involving any of such shares of stock; and particularly without prejudice to the rights of Co-Operative Security Corporation as the holder of certain properties and/or certificate of stock and/or contracts of sale as security for the repayment to said Co-Operative Security Corporation of certain indebtednesses on the part of one or more stockholders of said Pacific Reclamation Water Company, or on the part of any other persons.

13. Description of proposed work dam and canal system per maps and plans on file

14. Estimated cost of works work completed

15. Estimated time required to construct the works is work completed

PACIFIC RECLAMATION
WATER COMPANY Applicant
By /s/ Milton B. Badt
Milton B. Badt

OF STATE ENGINEER

AFFIDAVIT OF PUBLICATION

STATE OF NEVADA)
) SS.
COUNTY OF ELKO)

(Filed Aug. 7, 1944)

Chas. J. Triplett, being duly sworn, deposes and says, that he is the Publisher of Wells Progress, a weekly newspaper published at Wells, Elko County, Nevada, and that the Application No. 11125 a copy of which is hereto attached, was published in said newspaper in each issue for five weeks. Date of first publication July 7, 1944; last publication August 4, 1944.

/s/ Chas. J. Triplett

Before me this 4th day of August, 1944

April 14-1946

/s/ E. Bollschweiler
Notary Public in and for
the County of Elko,
State of Nevada

APPLICATION FOR PERMISSION TO CHANGE THE POINT OF DIVERSION AND PLACE OF USE OF THE PUBLIC WATERS OF THE STATE OF NEVADA HERETOFORE APPROPRIATED.

Application No 11125,

NOTICE IS HEREBY GIVEN that on the 14th day of June, 1944, in accordance with section 59, Chapter 59, of the Statues of 1919, Pacific Reclamation Water Company, of Metropolis, County of Elko, State of Nevada, made applcation to the State Engineer of Nevada

for permission to change the point of diversion and place of use of 6.320 cubic feet per second of the waters of Bishop Creek, heretofore appropriated under claim of vested right as evidenced by Proof of Appropriation No. 00608, and as set forth in the Humboldt River Decree.

Diversion is to be made from Bishop Creek at a point in the NW¼ NE¼ Sec. 27, T. 39 N., R. 62 E., M.D.B.&M., or at a point from which the S.¼ corner of said section 27 bears S. 15° 05' W., 4.285 feet. The water is to be conveyed to all or portions of sections 18, 19, 28, 29, 30, 31 and 32, T. 39 N., R. 62 E., and sections 13, 14, 15, 22, 23, 24 and 25, T. 39 N., R. 61 E., M.D.M., and there used for irrigation purposes from April 1st to August 31st of each year.

The water desired to be changed is diverted at points in the NW¼ SW¼ Sec. 1, T. 38 N., R., 61 E; SW¼ SW¼ Sec. 31, SW¼ NW¼ Sec. 27 and NW¼ SE¼ Sec. 28 T. 39 N., R. 62 E., M.D.M. and the water is conveyed to portions of sections 28, 29, 31 and 32. T. 39 N., R. 62 E., and portions of sections 1 and 2, T. 38 N., R. 61 E., M.D.M., where it is used for irrigation purposes from April 1st to August 31st of each year.

First publication July 7, 1944.
Last publication Aug. 4, 1944.

Signed:

ALFRED MERRITT SMITH,
State Engineer.

AFFIDAVIT OF PUBLICATION

STATE OF NEVADA)
) SS.
COUNTY OF ELKO)

(Filed Aug. 7, 1944)

Chas. J. Triplett, being duly sworn, deposes and says, that he is the Publisher of Wells Progress, a weekly newspaper published at Wells, Elko County, Nevada, and that the Application No. 11127 a copy of which is hereto attached, was published in said newspaper in each issue for five weeks. Date of first publication July 7, 1944; last publication August 4, 1944.

/s/ Chas. J. Triplett

Before me this 4th day of August, 1944

April 14-1946

/s/ E. Bollschweiler
Notary Public in and for
the County of Elko,
State of Nevada

APPLICATION FOR PERMISSION TO CHANGE THE POINT OF DIVERSION AND PLACE OF USE OF THE PUBLIC WATERS OF THE STATE OF NEVADA HERETOFORE APPROPRIATED.

Application No. 11127,

NOTICE IS HEREBY GIVEN that on the 14th day of June, 1944, in accordance with section 59, Chapter 59, of the Statutes of 1919, Pacific Reclamation Water Company, Metropolis, County of Elko, State of Nevada, made application to the State Engineer of Nevada for

permission to change the point of diversion and place of use of 1.375 cubic feet per second of the waters of Burnt, Creek, heretofore appropriated under claim of vested right as evidenced by Proof of Appropriation No. 00608B, and as set forth in the Humboldt River Decree.

Diversion is to be made from Burnt Creek at a point in the SW¼ NE¼ Sec. 13, T. 39 N., R. 61 E., M.D.B.&M., or at a point from which the S.¼ corner of said section 13 bears S. 34° 10' E., 3.355 feet. The water is to be conveyed to all or portions of sections 18, 19, 28, 29, 30, 31 and 32, T. 39 N., R. 62 E., and sections 13, 14, 15, 22, 23, 24 and 25, T. 39 N., R. 61 E., M.D M., and there used for irrigation purposes from April 1st to August 31st of each year.

The water desired to be changed is diverted at points in the NW¼ NW¼ and SW¼ NW¼ Sec. 25, T. 39 N., R. 61 E., and SE¼ NE¼ Sec. 2, T. 88 N., R. 61 E., M.D.M., and is conveyed to portions of section 25, T. 39 N., R. 61 E., and portion of section 2, T. 38 N., R. 61 E., M.D.M., where it is used for irrigation purposes from April 1st to August 31st of each year.

First publication July 7, 1944.
Last publication Aug. 4, 1944.

Signed:

ALFRED MERRITT SMITH,
State Engineer.

Application No. 11125 (To change) Certificate Record No. 2846 Book 9 Page 2846

THE STATE OF NEVADA

CERTIFICATE OF APPROPRIATION OF WATER

WHEREAS, Max F. Uhlig, Rancher has presented to the State Engineer of the State of Nevada Proof of Application of Water to Beneficial Use, from Bishop Creek through Pacific Rec. Water Co. Canal & Diversion for Irrigation and Domestic purposes. The point of diversion of water from the source is as follows: NW¼ NE¼ of Sec. 27, T. 39 N. R.62 E., M.D.B. & M. or at a point from which the S¼ Cor. of said Sec. 27 bears S. 15.05' W., 4285.0 feet. situated in Elko County, State of Nevada.

NOW KNOW YE, That the State Engineer, under the provisions of Section 72, Chapter 46, Statutes of 1937 has determined the date, source, purpose and amount of such appropriation, together with the place to which such water is appurtenant, as follows:

Name of appropriator Pacific Reclamation Water Company

Post-office address Metropolis, Nevada

Amount of appropriation 6.32 c.f.s.

Period of use, from April 15 to August 15 of each year

Date of priority of appropriation As decreed, see below.

Description of lands irrigated, see attached sheets.

*This application is made to change the Point of Diversion and Place of Use of the waters of Bishop Creek heretofore Decreed to the Metropolis Land Co., predecessors in interest to the Pacific Reclamation Water Company, in the Humboldt River Decree, Case No. 2804, 6th Judicial Dist. Court of Nevada.

Year of Priority	Flow in C.F.S.
1876	1.433
1886	1.968
1887	.762
1888	.762
1889	.762
1892	.521
1911	.112

The right to water hereby determined is limited to the amount which can be beneficially used, not to exceed the amount above specified, and the use is restricted to the place where acquired and to the purpose for which acquired.

IN TESTIMONY WHEREOF, I Alfred Merritt Smith, State Engineer of Nevada, have hereunto set my hand and the seal of my office, this 14th day of February, A. D. 1945.

/s/ Alfred Merritt Smith
State Engineer.

Recorded Feb. 16, 1945 *Bk.* 3 *Page* 311-312

Elko *County Records*

[Illegible]

SEC-TION	SUB-DIVISION	TOWN-SHIP NORTH	RANGE EAST	CULTI-VATED ACREAGE
PERMIT 11125, CERT 2846				
18	Lot 2	39	62	7.8
	Lot 3			30.8
	Lot 4			21.3
13	NE¼SE¼		61	35.8
	SE¼SE¼			30.3
24	NE¼NE¼			40.0
	SE¼NE¼			29.4
	SW¼NE¼			30.6
	NE¼SE¼			16.6
	NW¼SE¼			40.0
	NE¼SW¼			12.1
	SE¼SW¼			40.0
	SW¼SE¼			40.0
	SE¼SE¼			12.4
25	NW¼NW¼			40.0
	NE¼NW¼			40.0
	SW¼NW¼			40.0
	SE¼NW¼			40.0
	NW¼SW¼			40.0
	NE¼SW¼			40.0
	SW¼SW¼			40.0
	SE¼SW¼			15.4
14	SE¼SW¼			22.6
	SW¼SW¼			23.2
15	SE¼SE¼			10.4
22	NW¼NE¼			20.0
	W½NE¼NE¼			20.0
	SW¼NE¼			22.4
	E½NE¼NE¼			20.0
	SE¼NE¼			40.0
	NE¼SE¼			40.0
23	NW¼NW¼			40.0
	NE¼SE¼			40.0
	SE¼SE¼			40.0

15	SW¼SE¼	3.9
22	SE¼SE¼	40.0
23	NE¼NE¼	30.0
	NW¼SW¼	20.0
	SW¼SW¼	20.0
24	SW¼SW¼	40.0
25	NE¼NE¼	40.0
13	SW¼SE¼	40.0
22	NW¼SE¼	30.0
	SW¼SE¼	40.0
24	SE¼NE¼	10.6
	NE¼SE¼	23.4
	SE¼SE¼	27.6
	NW¼NE¼	29.4
	NE¼SW¼	28.9
	NE¼NW¼	40.0
	SE¼NW¼	40.0
	NW¼NE¼	10.6
		3,455.1

SEC-TION	SUB-DIVISION	TOWN-SHIP NORTH	RANGE EAST	CULTI-VATED ACREAGE
PERMIT 11125, CERT 2846				
28	SE¼NE¼	39	62	12.8
	NE¼SE¼			15.0
	NW¼SE¼			30.9
	SW¼NE¼			13.2
	SE½NW¼			7.4
	N½SW¼			80.0
	SE¼SW¼			15.7
	SW¼SW¼			28.8
29	SW¼NE¼			40.0
	SE¼NW¼			40.0
	NE¼NW¼			40.0
	SE¼NE¼			24.4
	N½SE¼			80.0
	S½SE¼			80.0

	NE¼SW¼	25.6
	SW¼SW¼	33.9
	SE¼SW¼	40.0
30	W½SE¼	80.0
	NE¼SE¼	30.0
	SE¼SE¼	13.3
31	NW¼NE¼	9.8
	NE¼NE¼	3.1
32	NE¼NE¼	39.2
	SE¼NE¼	29.1
	W½NE¼	80.0
	NE¼SE¼	23.0
	NW¼SE¼	40.0
	NW¼	160.0
	NE¼SW¼	18.5
	NW¼SW¼	22.4
30	SE¼NE¼	40.0
	SW¼NE¼	31.9
	NW¼NE¼	40.0
	NE¼NW¼	21.2
	Lot 1	45.2
29	NE¼NE¼	14.4
	NW¼SW¼	40.0
	SW¼SW¼	6.1
30	SE¼SE¼	26.7
	NE¼SE¼	10.0
19	SE¼SE¼	18.8
	SW¼SE¼	40.0
	NE¼SE¼	36.0
	NW¼SE¼	26.6
	SE¼NE¼	11.0
	SE¼NW¼	31.1
	Lot 1	47.3
	Lot 2	51.6
	Lot 3	52.0
	Lot 4	52.3
	NE¼SW¼	40.0
	SE¼SW¼	40.0

SE¼NE¼	6.4
SW¼NE¼	18.1
NW¼SE¼	12.8
NE¼SE¼	4.0

Application No. 11127 (To change) Certificate Record No. 2848 Book 9 Page 2558

THE STATE OF NEVADA

CERTIFICATE OF APPROPRIATION OF WATER

WHEREAS, Max F. Uhlig, Rancher has presented to the State Engineer of the State of Nevada Proof of Application of Water to Beneficial Use, from Burnt Creek through Pacific Rec. Water Company Canal for Irrigation and Domestic purposes. The point of diversion of water from the source is as follows: SW¼ NE¼ of Sec. 13, T. 39 N., R. 61 E., M.D.B. & M. or at a point from which the SE Cor. of said Sec. 13 bears S. 34°10' E., 32555.0 feet. situated in Elko County, State of Nevada.

NOW KNOW YE, That the State Engineer, under the provisions of Section 79, Chapter 46, Statutes of 1937 has determined the date, source, purpose and amount of such appropriation, together with the place to which such water is appurtenant, as follows:

Name of appropriator Pacific Reclamation Water Company

Post-office address Metropolis, Nevada

Amount of appropriation 1.375 c.f.s.

Period of use, from April 15 to August 15 of each year

Date of priority of appropriation As decreed, see below.

Description of lands irrigated, see attached sheets.

*This application is made to change the Point of Diversion and Place of Use of the waters of Burnt Creek heretofore Decreed to the Metropolis Land Company, predecessors in interest to the Pacific Reclamation Water Company, in the Humboldt River Decree, Case No. 2804, 6th Judicial District Court of Nevada.

Year of Priority	Flow in C.F.S.
1876	.381
1893	.994

The right to water hereby determined is limited to the amount which can be beneficially used, not to exceed the amount above specified, and the use is restricted to the place where acquired and to the purpose for which acquired.

IN TESTIMONY WHEREOF, I Alfred Merritt Smith, State Engineer of Nevada, have hereunto set my hand and the seal of my office, this 4th day of February, A. D. 1945.

/s/ Alfred Merritt Smith
State Engineer.

Recorded Feb. 16, 1945 *Bk.* 3 *Page* 313

Elko *County Records*

[Illegible]

SEC-TION	SUB-DIVISION	TOWN-SHIP NORTH	RANGE EAST	CULTI-VATED ACREAGE
PERMIT 11127, CERT 2848				
28	SE¼NE¼	39	62	12.8
	NE¼SE¼			15.0
	NW¼SE¼			30.9
	SW¼NE¼			13.2
	SE¼NW¼			7.4
	N½SW¼			80.0
	SE¼SW¼			15.7
	SW¼SW¼			28.8
29	SW¼NE¼			40.0
	SE¼NW¼			40.0
	NE¼NW¼			40.0
	SE¼NE¼			24.4
	N½SE¼			80.0
	S½SE¼			80.0
	NE¼SW¼			25.6
	SW¼SW¼			33.9
	SE¼SW¼			40.0
30	W½SE¼			80.0
	NE¼SE¼			30.0
	SE¼SE¼			13.3
31	NW¼NE¼			9.8
	NE¼NE¼			3.1
32	NE¼NE¼			39.2
	SE¼NE¼			29.1
	W½NE¼			80.0
	NE¼SE¼			23.0
	NW¼SE¼			40.0
	NW¼			160.0
	NE¼SW¼			18.5
	NW¼SW¼			22.4
30	SE¼NE¼			40.0
	SW¼NE¼			31.9
	NW¼NE¼			40.0
	NE¼NW¼			21.2

	Lot 1			45.2
29	NE¼NE¼			14.4
	NW¼SW¼			40.0
	SW¼SW¼			6.1
30	SE¼SE¼			26.7
	NE¼SE¼			10.0
19	SE¼SE¼			18.8
	SW¼SE¼			40.0
	NE¼SE¼			36.0
	NW¼SE¼			26.6
	SE¼NE¼			11.0
	SE¼NW¼			31.1
	Lot 1			47.3
	Lot 2			51.6
	Lot 3			52.0
	Lot 4			52.3
	NE¼SW¼			40.0
	SE¼SW¼			40.0
	SE¼NE¼			6.4
	SW¼NE¼			18.1
	NW¼SE¼			12.8
	NE¼SE¼			4.0

SEC-TION	SUB-DIVISION	TOWN-SHIP NORTH	RANGE EAST	CULTI-VATED ACREAGE
PERMIT 11127, CERT 2848				
18	Lot 2	39	62	7.8
	Lot 3			30.8
	Lot 4			21.3
13	NE¼SE¼		61	35.8
	SE¼SE¼			30.3
24	NE¼NE¼			40.0
	SE¼NE¼			29.4
	SW¼NE¼			30.6
	NE¼SE¼			16.6
	NW¼SE¼			40.0
	NE¼SW¼			12.1

	SE¼SW¼	40.0
	SW¼SE¼	40.0
	SE¼SE¼	12.4
25	NW¼NW¼	40.0
	NE¼NW¼	40.0
	SW¼NW¼	40.0
	SE¼NW¼	40.0
	NW¼SW¼	40.0
	NE¼SW¼	40.0
	SW¼SW¼	40.0
	SE¼SW¼	15.4
14	SE¼SW¼	22.6
	SW¼SW¼	23.2
15	SE¼SE¼	10.4
22	NW¼NE¼	20.0
	W½NE¼NE¼	20.0
	SW¼NE¼	22.4
	E½NE¼NE¼	20.0
	SE¼NE¼	40.0
	NE¼SE¼	40.0
23	NW¼NW¼	40.0
	NE¼SE¼	40.0
	SE¼SE¼	40.0
15	SW¼SE¼	3.9
22	SE¼SE¼	40.0
23	NE¼NE¼	30.0
	NW¼SW¼	20.0
	SW¼SW¼	20.0
24	SW¼SW¼	40.0
25	NE¼NE¼	40.0
13	SW¼SE¼	40.0
22	NW¼SE¼	30.0
	SW¼SE¼	40.0
24	SE¼NE¼	10.6
	NE¼SE¼	23.4
	SE¼SE¼	27.6
	NW¼NE¼	29.4
	NE¼SW¼	28.9

NE¼NW¼	40.0
SE¼NW¼	40.0
NW¼NE¼	10.6
	3,455.1

WRIGHT & EARDLEY
ATTORNEYS AT LAW
469 IDAHO STREET – P.O. Box 391
ELKO, NEVADA

GEORGE F. WRIGHT
ROSS P. EARDLEY

TELEPHONE
REPUBLIC 6-3179

June 18, 1962

Division of Water Resources
Carson City, Nevada

RE: Application No. 1125
Pacific Reclamation Water Co.

Gentlemen:

This letter is in reference to the Water Rights described in the Edwards Decree of Humboldt River Adjudication, Page 81, under the claimant METROPOLIS LAND COMPANY, Bishop and Burnt Creeks, Nos. 5 and 6.

The lands described under this bracket are now, and have been for many years, owned by Alonzo Knudsen of Wells, Nevada. However, on June 14, 1944, the Pacific Reclamation Water Co. filed in the office of the State Engineer, an Application to transfer the waters from Bishop Creek which are included in this bracket to other lands. This Application was subsequently approved by the State Engineer on September 12, 1944.

Since these lands are owned by Mr. Knudsen and there seems to be a clear chain of title, to Mr. Knudsen from the original claimant "Metropolis Land Co.", there is some question as to what right, if any, the Pacific Reclamation Water Co. had to transfer these waters.

To clear up any question about this, we are seeking any Deed, agreement or other document which at sometime in the past would have reserved or otherwise conveyed these waters to the Pacific Reclamation Water Co. We thought it quite possible that at the time you processed the Application, you obtained or otherwise gained information concerning such a deed or document.

If you have any information on this in your file, we will appreciate knowing about the same and if there is such a Deed or agreement, we would appreciate a copy; we will be happy to pay any charges.

Yours very truly,

WRIGHT & EARDLEY
/s/ Ross P. Eardley

RPE/jsb

a
11125, 11126
11127, 11128 June 22, 1962

Wright & Eardley
Attorneys at Law
469 Idaho Street
Elko, Nevada

Attention Ross P. Eardley, Esq.

Dear Sirs:

Your letter of June 18th has been received.

The water rights which were transferred by virtue of Permits 11125 through 11128, inclusive, are in the name of the Pacific Reclamation Water Co.

The Pacific Reclamation Water Company confirmed ownership of these rights by a Quitclaim Deed dated June 5, 1944, by and between the Cooperative Security Corporation, grantor, and Pacific Reclamation Water Co., grantee.

This deed is recorded in BOOK 52, Page 590 of DEEDS, in the Elko County Recorder's Office.

Very truly yours,

EDMUND A. MUTH
State Engineer

By

Thomas J. Smales
Hydraulic Engineer

TJS:cme

KENNY C. GUINN
Governor

R. MICHAEL TURNIPSEED, P.E.
State Engineer
WAYNE TESTOLIN
Supervising Water Commissioner

STATE OF NEVADA

[SEAL]

DEPARTMENT OF CONSERVATION
AND NATURAL RESOURCES
DIVISION OF WATER RESOURCES
850 Elm Street
Elko, Nevada 89801
(775) 753-1102 • Fax (775) 753-9483

June 15, 1999

RE: Humboldt River Proof 00608

William Robert Hawks
% John E. Marvel
P.O. Box 2645
Elko, NV 89803

Dear Mr. Hawks:

Please be advised that Humboldt River Proof 00608 has been assigned to show William Robert Hawks, Joyce Lee Hawks, William Roy Hawks and Greg Alan Hawks as owners of a portion being 349.29 acre feet appurtenant to 116.43 acres.

The other owners of record are Anna E. Bond, et al.; and Dalton Livestock.

This assignment reflects only the information that has been filed with this office and may be subject to amendment upon receipt of additional documentation.

If you have any questions, please feel free to contact me in the Elko office at 753-1102. I apologize for the delay in assigning this proof, but there were some complicated details.

Sincerely,

/s/ Barbara Kightlinger
Barbara Kighlinger
Management Assistant II

Case No. CV 2804-5

Dept. 1

SIXTH JUDICIAL DISTRICT COURT IN AND FOR THE STATE OF NEVADA IN AND FOR THE COUNTY OF HUMBOLDT

* * *

MICHAEL T. HOWELL and CHERI A. HOWELL,

Petitioners,

v.

HUGH RICCI, P.E., STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, STATE OF NEVADA; and PACIFIC RECLAMATION WATER COMPANY, a Nevada corporation,

Respondents.

SECOND AMENDED PETITION FOR JUDICIAL REVIEW

(Filed Nov. 28, 2001)

Come now Petitioners Michael T. Howell and Cheri A. Howell, husband and wife, County of Elko, State of Nevada, by and through their attorney, Ross E. de Lipkau of Marshall Hill Cassas & de Lipkau, pursuant to NRS 533.450(1) and (3), and file this Second Amended Petition for Judicial Review from order or decision of the State Engineer.

FIRST CLAIM FOR RELIEF

1. Petitioners are residents of the County of Elko, State of Nevada, and conduct a ranching operation in the Metropolis area of Elko County, Nevada, located on the Humboldt River stream system.

2. On August 20, 1997, Petitioners acquired certain ranching property from William Robert Hawks, et al., as evidenced by a Grant Bargain and Sale Deed which was recorded in Book 1005 at Page 72 in this Official Records of the Elko County Recorder, together with all of the grantors' interest in and to all water rights appurtenant to said property.

3. The subject property included all lands described and set forth under a portion of Proof No. 00608 of the Decree entered in Civil Action Number 2804 in the Sixth Judicial District Court of the State of Nevada, in and for the County of Humboldt, entitled "In the Matter of the Determination of the Relative Rights of Claimants and Appropriators of the Waters of the Humboldt River Stream System and Tributaries", set out in the Blue Book compilation of "The Humboldt River Adjudication – 1923-1938" at page 81 of the "Edwards Decree" more particularly described as follows:

Claimant – Metropolis Land Company.
Source – Bishop and Burnt Creeks.
Ditch – Nos. 5 and 6

Culture Acres				Location				Duty of Water		
Priority	Harvest	Meadow Pasture	Diversified Pasture	Subdivision	Sec.	Tp.	R.	Length of Season	CFS	Acre Feet
1876	147.44	....	....	E½ SW¼	2	38	61			
				SE¼	2	38	61			
				SE¼ NE¼	2	38	61			
				W½ SW¼	1	38	61			
				SW¼ SW¼	1	38	61	4-15-8-15	1.814	442.32

4. on August 19, 1997, the undersigned, on behalf of Petitioners' immediate predecessor, pursuant to the requirements of the State Engineer's office, submitted to the Division of Water Resources individual Reports of Conveyance and Abstracts of Title necessary to bring the ownership of a portion of Proof 00608 current into the name of William Robert Hawks, et al., so that the subsequent transfer could be made of the subject water rights into the name of Petitioners. Copies of the Reports of Conveyance and Abstracts of Title submitted on August 19, 1997 are attached hereto as Exhibits "B", "C", "D" and "E", and made a part hereof.

5. Petitioners hereby further include an additional Report of, Conveyance and Abstract of Title (not originally submitted to the State Engineer) for the balance of the subject portion of Proof 00608, which water rights are appurtenant to lands also owned by Petitioners. Said Report of Conveyance and Abstract of Title are attached hereto as Exhibit "F" and made a part hereof.

6. The effect of the Reports of Conveyance and Abstracts of title evidenced by Exhibits B and F demonstrate that a clear chain of title exists from Petitioners' predecessors in interest, commencing from the original claimant under the subject portion of Proof No. 00608, being Metropolis Land Company, into the name of Petitioners.

7. On December 28, 1998, after almost sixteen (16) months of waiting for the State Engineer's action on the transfer, John E. Marvel, Esq., prior attorney for Petitioners, communicated with the State Engineer for the purpose of requesting his personal assistance in reviewing the status of the transfer of the above mentioned Proof. A copy

of said letter is attached hereto as Exhibit "G" and made a part hereof.

8. By letter dated February 11, 1999 from the State Engineer, signed by Lisa B. Schettler, Engineering Technician V, John E. Marvel, Esq., was advised that all water rights under the subject portion of Proof No. 00608 had been allegedly transferred off of Petitioners' lands in 1944 by Permit Nos. 11125 and 11127, which applications had been filed by Pacific Reclamation Water Company, a Nevada corporation. A copy of the State Engineer's letter is attached hereto as Exhibit "H" and made a part hereof.

9. On May 25, 1999, John E. Marvel, Esq., on behalf of Petitioners, again corresponded with the State engineer for the purpose of discussing the transfer of the subject portion of Proof No. 00608. A copy of said letter is attached hereto as Exhibit "1" and made a part hereof.

10. On June 15, 1999, pursuant to the Reports of Conveyance and Abstracts of Title submitted to the Division of Water Resources by Petitioners on August 19, 1997, the Division of Water Resources advised the undersigned that the subject portion of Humboldt River Proof No. 00608 had been assigned to Petitioners' grantors, William Robert Hawks, et al. A copy of the letter from Barbara Kightlinger, Management Assistant II, Division of Water Resources, is attached hereto as Exhibit "J" and made a part hereof.

11. The undersigned received a subsequent letter ("Exhibit A") dated July 19, 1999 from Barbara Kightlinger, Management Assistant II, advising that the transfer evidenced by her June 15, 1999 letter (Exhibit J) was being rescinded based upon the State Engineer's February 11, 1999 letter (Exhibit H). This July 19, 1999 letter is the

decision or order of the State engineer giving rise to this proceeding.

12. The State Engineer's letter of February 11, 1999 which purportedly serves as a basis for the July 19; 1999 rescission letter, alleges that the water rights under the subject portion of Proof No. 00608 were transferred from the Petitioners' property in 1944 and that such transfer was made in compliance with a contract between the State of Nevada and Pacific Reclamation Company, a Nevada corporation, dated December 28, 1910. A copy of said contract is attached hereto as Exhibit "K" and made a part hereof.

13. Notwithstanding the State Engineer's position, Petitioners have thoroughly researched and investigated this matter and have ascertained that Petitioners' lands were never subject to the Carey Act Project contemplated by the December 28, 1910 Contract between the State of Nevada and Pacific Reclamation Company except for a parcel consisting of 80 acres, which was later relinquished from the Carey Act land selection by Metropolis Land Company, a Massachusetts corporation, successor to Pacific Reclamation, on August 16, 1916. The lands subject to the 1910 Contract are specifically identified in Segregation List No. 9, a copy of which is attached hereto as Exhibit "L" and made a part hereof. A copy of the relinquishment of the only lands now owned by Petitioners which have been subject to the Carey Act land selection (the E½NE¼ Sec. 2, T. 38 N., R. 61 E.) is attached hereto as Exhibit "M" and made a part hereof.

14. The Bishop Creek dam and canal system, created pursuant to the 1910 Contract between the State of Nevada and Pacific Reclamation Company, is a Carey Act

Project and pertains to storage rights only. Petitioners are seeking transfer of the subject portion of Proof No. 00608 which are vested rights as adjudicated in the Bartlett and Edwards Decrees, and are in no way related to the storage rights as set forth in Permit Nos. 1000 and 1807, which applications were filed in conjunction with the above mentioned 1910 Contract.

15. Petitioners have further ascertained that Pacific Reclamation Water Company, a Nevada corporation (a separate entity and not related to Pacific Reclamation Company), the applicant in the purported change and transfer of the point of diversion and place of use of the subject portion of Proof No. 00608 in 1944, was never in the chain of title to the subject water rights evidenced by the subject portion of Proof No. 00608 in 1944, and therefore the purported transfer of water rights from Petitioners' lands was invalid and void ab initio.

16. Petitioners are informed and belief that all water rights appurtenant to their lands, as evidenced by the subject portion of Proof No. 00608 have been historically, continuously and openly used for the irrigation of the subject lands and applied to beneficial use since 1876 as indicated by the priority date set forth in the Edwards Decree and as evidenced by the records of the Humboldt river Adjudication, including, without limitation, the worksheet prepared in 1921 by the State Engineer's office (a copy of which is attached hereto as Exhibit "N" and made a part hereof), the cultural map (Map No. 4) filed in support of the subject proof on April 30, 1915 (a copy of which is attached hereto as Exhibit "O"), and State engineer's Exhibit No. 00608 admitted in evidence in the Humboldt River Adjudication on January 8, 1925 (a copy of which is attached hereto as Exhibit "P"). The foregoing

specifically demonstrates that the vested water rights appurtenant to Petitioners' lands described in the subject portion of Proof No. 00608 had been continuously used from 1876 to 1921, and which water rights have continuously been placed to beneficial use thereafter to the present time by Petitioners and their predecessors.

17. Petitioners are entitled to the transfer of the entirety of the subject portion of Proof No. 00608 as set forth in the Edwards Decree into their names as the legal owners thereof.

SECOND CLAIM FOR RELIEF

1. Petitioners incorporate all facts in their First Claim For Relief as if set forth in full herein.

2. The State Engineer's records reflect that Permits 11125 and 11127 are in the name of Pacific Reclamation Company.

3. Pursuant to NRS 533.450(3), such entity is named as it may have been affected by the order or decision of the State Engineer from which this action lies.

4. That Respondent Pacific Reclamation Water Company, a Nevada corporation, has no interest in Claim No. 00608.

WHEREFORE, it is respectfully requested this Court enter an Order as follows:

1. Awarding to Petitioners Claim No. 00608, as set forth in the Edwards Decree, thereby allowing such decreed water to be diverted to Petitioners' real property as historically has occurred.

2. That Respondent Pacific Reclamation Water Company be declared to have no interest in Claim No. 00608, and any reference therein in Permits 11125 and 11127 be declared null and void.

3. For costs of suit, including reasonable attorney's fees.

4. For such other and further relief as the Court may deem just and proper.

Dated this 30th day of October, 2001.

MARSHALL HILL CASSAS
& de LIPKAU
333 Holcomb Ave, Ste 300
P. O. Box 2790
Reno, NV 89505-2790

By /s/ Ross E. de Lipkau
Ross E. de Lipkau
(NV Bar #1628)

STATE OF NEVADA)
: ss:
COUNTY OF ELKO)

Under penalties of perjury, the undersigned, MICHAEL T. HOWELL and CHERI A. HOWELL, declare that they are the petitioners named in the foregoing document and know the contents thereof; that the pleading is true of their own knowledge, except as to those

matters stated on information and belief, and that as to such matters they believes it to be true.

/s/ Michael T. Howell
MICHAEL T. HOWELL

/s/ Cheri A. Howell
CHERI A. HOWELL

State of Nevada
County of Elko

SUBSCRIBED and SWORN to before me

this 5th day of November, 2001.

/s/ Sherry Justus
Notary Public

[SEAL]
SHERRY JUSTUS
Notary Public, State of Nevada
Appointment No. 01674806
My Appt. Expires March 8, 2005

CERTIFICATE OF SERVICE

I certify that I am an employee of Marshall Hill Cassas & de Lipkau, and that on this date I placed a true copy of the foregoing Second Amended Petition for Judicial Review in a sealed enveloped addressed to the following for delivery by Reno/Carson Messenger Service:

Paul G. Taggart, Esq.
Deputy Attorney General
100 N. Carson St.
Carson City, NV 89701-4717

I further certify that I deposited for mailing at Reno, Nevada, certified mail, return receipt requested, a true

copy of the foregoing Second Amended Petition for Judicial Review addressed to the Resident Agent for Pacific Reclamation Water Company:

Mr. Herbert M. Uhlig
Metropolis
Elko County
Wells, NV 89835

Dated this 19th day of November, 2001.

/s/ [Illegible]

SUPREME COURT OF THE STATE OF NEVADA

* * *

MICHAEL T. HOWELL
and CHERI A. HOWELL,

Appellant,

v. Case No. 39788

HUGH RICCI P.E. STATE
ENGINEER DIVISION OF WATER
RESOURCES, DEPARTMENT OF
CONSERVATION AND NATURAL
RESOURCES, STATE OF NEVADA,
and PACIFIC RECLAMATION
WATER COMPANY,
a Nevada corporation,

Respondents. /

APPEAL

from the Sixth Judicial District Court, Humboldt County
The Honorable Richard A. Wagner, District Judge

Appellants' Opening Brief

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G. Respondent, the Nevada State Engineer, deprived Appellants' predecessor in interest of water rights without due process of law.

Assuming for the sake of argument that the granting of Permits 11125 and 11127 was anything other than the equivalent of a wild deed in the Howells' chain of title, the Howells and their predecessors in interest were deprived of their property (Claim No. 00608) without due process of law. The foundation for Howells' argument on this issue is a series of indisputable facts:

(a) The Howells' predecessors, the Knudsens, acquired good and merchantable title to their ranch and water rights by recorded deeds as

illustrated by the chains of title submitted to the State Engineer. (2,3 J.A. 428-686). Counsel for the State Engineer has stipulated that, "but for the filing and granting of Applications 11125 and 11127, the several chains of title submitted by the Howells are sufficient to complete the chain of title." (Hearing Transcript, Volume 1, p. 15-16).

(b) Pacific Reclamation had no right, title or interest in the Knudsens' water rights when it filed its Applications 11125 and 11127 with the State Engineer to change the place of use of Claim No. 00608 on June 14, 1944. Counsel for the State Engineer has stipulated that, "Its our opinion that there has not been a recordation filed" by Pacific Reclamation. (Hearing Transcript, Volume 1, p. 19)

(c) The State Engineer noticed the Pacific Reclamation Applications by publication only. (2 J.A. 379-381)

(d) After the publication period ran, the State Engineer transferred the Knudsens' water rights to Pacific Reclamation's ranches by Certificates of Appropriation dated February, 14, 1945. (2 J.A. 358, 393)

(e) There is no evidence that the Knudsens became aware of the State Engineer's action in time to lodge a protest pursuant to NRS 533.365(1).

(f) The State Engineer did not actually remove the water from the Howell ranch, until April 28, 2000. Irrigation continued on the property from 1876 to that date. Counsel for the State Engineer has stipulated that "the State Engineer has no evidence in his records or to

> his Knowledge, which would indicate that the 147 acres has not been fairly and continuously used from the decreed date, until April of 2000 when Mr. Testolin cut off the headgates." (Hearing Transcript, Volume 1, p. 16-17)

The preeminent case which bears on the foregoing facts is *Mullane v. Central Hanover Bank and Trust Co.*, 339 U. S. 306 (1950). In that case, the Trustee of a common trust fund petitioned the Surrogates Court in New York for approval of its annual account. The Trustee noticed its petition by publication under state law. Mullane was a court appointed special guardian for income beneficiaries who had not appeared in the proceeding. Mullane objected to the notice on grounds that it deprived his clients of property without due process of law under the Fourteenth Amendment. In its Opinion, the Supreme Court stated:

> . . . when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, *compare Hess v. Pawloski*, 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091, with *Wuchter v. Pizzutti*, 276 U.S. 13, 48 S.Ct. 259, 72 L.Ed 446 57 A.L.R. 1230, or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.

It would be idle to pretend that publication alone as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of the newspaper, . . . @ p. 315

. . .

The statutory notice to known beneficiaries is inadequate, not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand. However it may have been in former times, the mails today are recognized as an efficient and inexpensive means of communication. Moreover, the fact that the trust company has been able to give mailed notice to known beneficiaries at the time the common trust fund was established is persuasive that postal notification at the time of accounting would not seriously burden the plan.

In some situations the law requires greater precautions in its proceedings than the business world accepts for its own purposes. In few, if any, will it be satisfied with less. Certainly it is instructive, in determining the reasonableness of the impersonal broadcast notification here used, to ask whether it would satisfy a prudent man of business, counting his pennies but finding it in his interest to convey information to many persons whose names and addresses are in his files.

> We are not satisfied that it would. Publication may theoretically be available for all the world to see, but it is too much in our day to suppose that each or any individual beneficiary does or could examine all that is published to see if something may be tucked away in it that affects his property interests. @ pp 319-320.

The notice provided to the Knudsens (predecessors to Howells) was as defective as the notice struck down by *Mullane*. Both Pacific Reclamation and the State Engineer had constructive notice of Knudsens' Deeds of record. Their ranch was immediately southwest of stockholders in Pacific Reclamation, who could have seen the Knudsens on their ranch by looking over the fence. Personal service was appropriate and could have been easily accomplished. Mailing was a practical alternative.

Mullane is a well recognized case. See e.g. *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 795 (1983); *Walker v. City of Hutchinson*, 352 U.S. 112 (1956). The State of Nevada expressly recognized *Mullane* and *Mennonite* in its opinion in *Continental Insurance v. Moseley*, 100 Nev. 337, 683 P.2d 20 (1984). In 1988, the Supreme Court of the U.S. in turn recognized *Moseley* in the case of *Tulsa Professional Collection Service v. Pope*, 485 U.S. 478, 484. See also *Swartz v. Adams*, 93 Nev. 240, 563 P.2d 74 (1977), in which the Supreme Court of Nevada held that compliance with the execution sale statute by publication and posting was still a denial of due process, when mailing would most likely have given the debtor actual notice.

The case of *Walker v. City of Hutchinson*, supra, was a condemnation action in which the City elected to give notice to the landowner (Walker) by publication as permitted by Kansas statute. Walker did not hear of the proceeding until

after it was over. His subsequent suit was rejected by the Kansas Courts. The U.S. Supreme Court reversed the Kansas Supreme Court, and stated as follows:

> Measured by the principles stated in the *Mullane* Case, we think that the notice by publication here falls short of the requirements of due process. It is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property. In *Mullane* we pointed out many of the infirmities of such notice and emphasized the advantage of some kind of personal notice to interested parties. In the present case there seem to be no compelling or even persuasive reasons why such direct notice cannot be given. Appellant's name was known to the city and was on the official records. Even a letter would have apprised him that his property was about to be taken and that he must appear if he wanted to be heard as to its value. *Walker*, @ p. 1163.

None of the foregoing cases dealt with water rights, but water rights are as much a property right as an interest in a trust or estate. *Application of Filippini*, 66 Nev. 17, 202 P2d 535, 537 (1949). Early on, Nevada's Supreme Court recognized that principles of due process must be applied to the water law, both at the judicial and administrative levels. The essential components of due process are the right to notice and a hearing. *Ormsby County v. Kearny*, 37 Nev. 315, 142 Pac. 803, 806 (1914). In 1979, the Court acknowledged that the standard established by *Mullane* is applicable to the water law of Nevada. *Bailey v. State of Nevada*, 95 Nev. 378, 594 P.2d 734, 736 (1979). Likewise, in the Gila River Adjudication, the Arizona Supreme Court applied the principals of *Mullane* and *Mennonite* to determine whether the State had given

notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action." *In the Matter of the Rights to the Use of the Gila River*, 830 P.2d 442, 449 (Ariz. 1992).

The violation of due process in noticing the Knudsens by publication alone prevented the State Engineer from acquiring jurisdiction to transfer their water rights. The consequence is that the State Engineer's Certificates of Appropriation 2846 and 2848 granted pursuant to permits 11125 and 11127 respectively were void. In a water rights context, the equation of due process violation, lack of jurisdiction and voidness is discussed in *Eldorado at Santa Fe, Inc. v. Cook*, 822 P.2d 672 (N.M. 1991). There the Court stated:

> Eldorado contends that the defect in notice of an application to the state engineer did not result in an absence of jurisdiction. As discussed, the failure to follow statutory procedures is a due process violation and renders void all subsequent acts of the state engineer. *See Nesbit v. City of Albuquerque; Miller v. City of Albuquerque.* Therefore, the state engineer was without jurisdiction to grant Eldorado's application for change of location. @ p. 676.

The interrelationship of defective notice, lack of jurisdiction and voidness is recognized in the law of Nevada as well. See *Bogart v. Lathrop*, 90 Nev. 230, 523 P.2d 838 (1974), and *Bell v. Anderson*, 109 Nev. 363, 849 P.2d 350 (1993). In *Bell*, the Supreme Court specifically recognized the applicability of *Mennonite* and *Mullane* to the issue of whether a County Treasurer had the duty to make reasonable inquiry to determine the location of a delinquent taxpayer for purposes of mailing him notice.

It is not clear from the judgment of the District Court whether it considered the issue of adequate notice to the Knudsens. The Court does not specifically pronounce the published notice to be sufficient, but seems to assume that it was. The Court definitely assumes that Permits 11125 and 11127 issued by the State Engineer were valid, and could only be contested by timely appeal to the courts – i.e., in 1945. (3 J.A. 647)

An agency decision which is void, is stillborn and may be challenged at any time without regard to any of the 30 day procedural time limit accepted by the District Court. See *Bogart v. Lathrop*, *supra*, holding that failure to send property notice of tax delinquency to taxpayers, before sale of their property for delinquent taxes, resulted in a jurisdictional defect which rendered *all subsequent proceedings void*. Where tax deed and sale are void because of a jurisdictional defect, the statutory three-year statute of limitations does not apply. The challenge may be raised for the first time on appeal under the plain error doctrine. See *Bradley v. Romeo*, 102 Nev. 103, 716 P.2d 227, 228; *Klein v. Asgrow Seed Company*, 246 Cal. App.2d 87, 101 (1966). In that case at hand, the Howells' Second Amended Petition for Judicial Review alleges that the "purported transfer of water rights from Petitioners' lands was invalid and void ab initio." The Howells were not required to state every legal theory which might support their contention. See *Swartz v. Adams supra* @ p.245.

Once void, an agency decision cannot be validated by any later acts of the agency such as a letter decision from the State Engineer's staff, and is not given life by doctrines such as laches.

> Our decision is additionally mandated by constitutional due process requirements. Petitioners were entitled to notice and opportunity to be heard. *See Nesbit v. City of Albuquerque,* 91 N.M. 455, 575 P.2d 1340 (1977) (in zoning action, due process requires notice where change in zoning restriction would amount to change in fundamental character of property, and failure to give notice renders void all subsequent acts of zoning authority); *Miller v. City of Albuquerque,* 89 N.M. 503, 554 P.2d 665 (1976) (same). Failure to follow statutory procedures violated petitioners' due process rights, and no subsequent act could correct the defect. *Eldorado v. Cook, supra,* @ p. 675.
>
> Appellants have further contended that the appellees were guilty of laches and were thereby precluded from objecting to the validity of the certificate. We do not feel the doctrine of laches can be applied to this case for the certificate was void from the outset because the Commission did not hear the evidence and such a certificate cannot later be validated by any acts of appellees or anyone else on the theory of laches. *Walker v. DeConcini,* 341 P.2d 933, 940 (Ariz. 1959).

The State Engineer might find a defense such as laches rather awkward. The 55 year delay in challenging Permits 11125 and 11127 does not seem so long, given that it took the State Engineer 55 years to cut off the water to the Howell ranch.

Without regard to the adequacy of notice, the State Engineer had no authority under Nevada's water law to remove the Knudsens' water rights from their property without their consent. Nevada's water law does not explicitly prevent a rancher from transferring his neighbor's water to his own land, but in 1944 the law was clear that

an applicant to change the point of diversion or place of use of a water right must own or legally control it. In 1944, the predecessor statute of NRS 533.345 was NCL 1929 § 7944 which read in pertinent part as follows:

> Any corporation authorized to do business in this state, or any citizen of the United States, or any person who has legally declared his intention to become such, over the age of twenty-one years, desiring to appropriate any of the public waters, or *to change the place of diversion, manner of use or place of use of water already appropriated, shall, before performing any work in connection with such appropriation, change in place of diversion or change in manner or place of use,* make an application to the state engineer for a permit to make the same. (emphasis added)

NCL 1929 § 7948, also in effect in 1944, stated in part:

> It shall be the duty of the state engineer to approve all applications made in proper from where all fees, as in this act provided, have been paid, which contemplate the application of water to beneficial use, *and where the proposed use or change does not tend to impair the value of existing rights*, or be otherwise detrimental to the public welfare. But where there is no unappropriated water in the proposed source of supply, or *where its proposed use or change conflicts with existing rights*, or threatens to prove detrimental to the public interests, it shall be the duty of the state engineer to reject said application and refuse to issue the permit asked for. (emphasis added)

The only reasonable inference to be drawn from the foregoing statutes is that an application must be made by

the owner of the water right, his agent or other legal representative. Claim 00608 was owned by the Metropolis Land Company when the Humboldt River was finally adjudicated. Pacific Reclamation therefore had to establish for the State Engineer that it was a successor in interest to Metropolis Land Company, its agent or legal representative. Since the Knudsens had already acquired the land and water rights described in Claim 00608 by patent from the United States and by mesne conveyances from Metropolis Land Company, this would have been impossible for Pacific Reclamation to accomplish. (2, 3 J.A. 428-686) Pacific Reclamation indicated that its title may not be clear. On page 4 of its "Remarks" attached to Applications No. 11125 and 11127, Pacific Reclamation stated that the water rights "vested or to be vested in Pacific Reclamation Water Company . . ." are "subject to any valid subsisting contract of sale involving such water rights or any part thereof . . ." (2 J.A. 391) These Applications should have alerted the State Engineer to require more information. Instead, he obviously assumed Pacific Reclamation to be the owner of the Proof, with no further inquiry.

The result was that the State Engineer transferred the ownership of the Knudsens' water rights to another party without their consent, and without good cause. There is no evidence that the Knudsens were violating the water law in any way. Their only "violation" was that they did not respond to the published notice. This is far beyond the scope and purpose of NRS 533.345 or its predecessors. Government cannot deprive a person of his property rights, unless the proceeding is taken directly for that purpose. Proceedings which collaterally deprive owners of their property rights violate due process of law. *Noble v. Union River Logging River Co.*, 147 U.S. 165, 176 (1892).

The obvious example of a proceeding designed to take property is eminent domain. Nevada's water law is not and was never intended to be an eminent domain statute. No statute has ever given the State Engineer authority or jurisdiction to assign a water right from one person to another of his own volition. His ultra vires act deprived the Knudsens of their water rights without due process of law. The Knudsens' loss of their water rights after notice by publication was tantamount to condemnation without even a lawsuit naming them as defendants.

Thus, even if the State Engineer's publication of Applications 11125 and 11127, as required by NRS 533.360, is held constitutionally valid, such publication process cannot be utilized to divest an owner of a valid decreed water right. Stated differently, an unlawful "taking" of a property right (a water right) is not somehow cured by a constitutionally approved publication. One therefore does not cure the other.

* * *

IN THE SUPREME COURT OF
THE STATE OF NEVADA

MICHAEL T. HOWELL and CHERI A. HOWELL, Appellants, v. HUGH RICCI, P.E., STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, STATE OF NEVADA, and PACIFIC RECLAMATION WATER COMPANY, a Nevada corporation, Respondents.	Supreme Court Case No. 39788 District Court Case No. CV28045

APPEAL

from the Sixth Judicial District Court,
Humboldt County
The Honorable Richard A. Wagner, District Judge

RESPONDENT PACIFIC RECLAMATION WATER COMPANY'S ANSWERING BRIEF

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* * *

G. **HOWELL ARGUMENT G.:** *The STATE ENGINEER deprived the HOWELLS' predecessor in interest of water rights without due process of law.*

RESPONSE: It is noted parenthetically that "[t]he right to assert the statute of limitations as a complete defense is considered to be property within the protection of a constitutional guaranty of due process of law." 51 Am Jur 2d, *Limitation of Actions* § 4. Thus, if any party has a right to assert a due process argument, it is PACIFIC RECLAMATION. As discussed, PACIFIC RECLAMATION has a constitutionally protected property interest in the water rights at issue in this case and has the right to rely on NRS 533.450 and its earlier versions as a statute of repose. Had the STATE ENGINEER actually effected a transfer of these water rights by virtue of its June 15, 1999 letter, PACIFIC RECLAMATION would have been deprived of a protected property interest without due process of law. That, however, did not occur.

The HOWELLS seem to recognize that they did not raise any procedural due process arguments in the proceedings below and it is a well established rule that arguments raised for the first time on appeal need not be considered, although the Court can consider certain new issues *sua sponte*, where appropriate. *See Diamond Enters., Inc. v. Lau*, 113 Nev. 1376, 1378, 951 P.2d 73, 74 (1997) ("It is well established that arguments raised for the first time on appeal need not be considered by the Supreme Court."). The HOWELLS attempt to overcome this problem by arguing that the STATE ENGINEER'S 1945 decision was void *ab initio* because it deprived Alonzo

Knudsen of procedural due process. Therefore, argue the HOWELLS, this Court is free to set aside the decision at any time, irrespective of time or other limitations on bringing actions of this nature. However, this case does not present an occasion for this Court to consider such a novel argument for the first time on appeal.

First, the HOWELLS do not cite to any authority for their proposition that later interpretations of procedural due process standards by the courts which impose notice requirements beyond those contained in statutes can operate to render earlier decisions that complied with statutory notice requirements void *ab initio*. Rather, the HOWELLS cite to two independent lines of authority, one commencing in 1950 with *Mullane* which creates new minimum due process standards by requiring a reasonable attempt to give actual notice to people adversely affected by agency decisions, and another line of cases which provides that agency decisions which fail to comply with applicable procedures are void *ab initio*. The HOWELLS then try to combine these lines of cases into a new theory that they believe supports their proposition. However, there is no authority either combining these doctrines or stating that either doctrine was ever intended to apply retroactively in order to reopen administrative decisions that have been time-barred by statutes of repose for many years.

Second, with respect to the argument that notice by publication (which was the only notice required by statute with respect to the 1945 decision) is unconstitutional without there also being a reasonable effort to provide actual notice, the HOWELLS only ***surmise*** that Alonzo Knudsen did not have actual notice of Applications 11125 and 11127 before they were approved in 1945. The record does not indicate whether he had actual notice during that

time frame and he might just as easily as not have had actual notice before the Applications were approved. What the record ***does*** reflect is that Mr. Knudsen decided to question the validity of the Applications in 1962, with the assistance of legal counsel, 12 years after *Mullane* was handed down by the United States Supreme Court. Had Mr. Knudsen desired to argue that he was deprived of procedural due process by not receiving actual notice of the Applications, he could have done so in the 1960's under the same legal principles that the HOWELLS are now presenting to this Court. However, he chose not to do so and thus gave up the right to make such an argument.

The facts in the present case demonstrate that, in 1945, the STATE ENGINEER did, in fact, comply with all then-applicable notice requirements in approving Applications 11125 and 11127. Therefore, the HOWELLS should be preventing from making this argument at this late date pursuant to NRS 11.220 and 533.450.[10]

IV.

CONCLUSION

Based on the foregoing, PACIFIC RECLAMATION respectfully requests that this Court affirm the Findings of Fact, Conclusions of Law and Judgment entered by the District Court.

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[10] Although not discussed at any length in this Brief, PACIFIC RECLAMATION also believes that the HOWELLS' challenges to the 1945 decision are barred by the principles of waiver, laches and estoppel.

SUPREME COURT OF THE STATE OF NEVADA

* * *

MICHAEL T. HOWELL and
CHERI A. HOWELL,

Appellant,

v.

HUGH RICCI, P.E.,
STATE ENGINEER,
DIVISION OF WATER
RESOURCES, DEPARTMENT
OF CONSERVATION AND
NATURAL RESOURCES,
STATE OF NEVADA, and
PACIFIC RECLAMATION
WATER COMPANY,
a Nevada corporation,

Respondents. /

Case No. 39788

APPEAL

from the Sixth Judicial District Court,
Humboldt County
The Honorable Richard A. Wagner, District Judge

Appellants' Reply Brief

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G. The Nevada State Engineer deprived the Howells' predecessor in interest of water rights without due process of law.

Pacific Reclamation argues that it has a constitutionally protected property right to use the statute of limitations in NRS 533.450 against the Howells. Pacific Reclamation then blends this property right with its claim to the Knudsen water rights, and argues that its interest in the water rights may not be taken without due process of law. Obviously Pacific Reclamation finds no fault with the Howells' theory of due process, because it concedes that it would adopt the same theory to protect its own property. The big difference is that Pacific Reclamation has been given constitutional notice (personal service) and a chance to fight.

Pacific Reclamation then argues that the Howells are raising procedural due process issues for the first time by arguing that the State Engineer's decision was void *ab initio* in their Second Amended Petition for Judicial Review. (2, 3, 4 J.A. 414-740.) The fact that the Howells have cited additional cases and advanced additional legal theories which support the issue raised before the District Court does not mean that the issue itself was not before the Court. The case cited by Pacific Reclamation, *Diamond Enterprises v. Lau*, 113 Nev. 1376, 951 P.2d 73, 74 (1997),

should be considered in its factual context. In that case the appellant asked the Supreme Court to consider factual damage questions for the first time on appeal. The reasoning of *Swartz v. Adams*,[1] cited in the Howells' Opening Brief, is more readily applicable to the case at hand, even though it was a civil action, instead of judicial review of a State Engineer's decision. This is because the Second Amended Petition gave notice of its objective to any reader, as the complaint did in *Swartz*.

Without citing any cases to support its contentions, Pacific Reclamation then argues that the Supreme Court should not consider the Howells' appeal because:

(1) In 1945, *Mullane v. Central Hanover Bank & Trust*, had not been decided, and therefore could not apply "retroactively" to the State Engineer's decision;

(2) A violation of *Mullane's* notice standards does not make the State Engineer's decision void *ab initio*, and

(3) In any event the statute of limitations still runs.

The Howells will address these contentions in the numerical order set forth above:

(1) The concepts of reasonable notice and procedural due process were connected long before *Mullane*. The State Engineer had access to *Wuchter v. Pizzutti*, 276 U.S. 13 (1928), which invalidated a New Jersey non-resident service statute with no provisions for personal notice to the non-resident. This case certainly had the effect of

[1] 93 Nev. 240, 563 P.2d 74, 77 (1977)

imposing a notice requirement beyond that contained in a statute. Pacific Reclamation's insinuation that the State Engineer did not have to abide by the due process clause until *Mullane* was decided, did not help Mullane's opponent the Central Hanover Bank, and it will not help the State Engineer. The Supreme Court interprets existing law. It is not a legislature.

(2) What Pacific Reclamation calls a "new theory" was addressed in some detail by *Bell v. Anderson*, cited in Howells' Opening Brief.[2] Initially the Court recognized that the failure to send a notice required of the county tax receiver by statute "resulted in a jurisdictional defect which rendered all subsequent proceedings void." At p. 351. The court then acknowledged that under *Mullane and Mennonite*, "prior to an action which will affect an interest in life, liberty, or property protected by the Due Process Clause of the Fourteenth Amendment, a state must provide notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action . . . " At p. 352. *Bell* clearly makes the connection between defective notice, want of jurisdiction, and voidness of subsequent proceedings.

Throughout its Brief, Pacific Reclamation speculates as to when the Knudsens received actual notice of the State Engineer's decision, as if this were material. The State Engineer's ongoing supply of water to the Knudsens would have dissuaded them from taking action regardless of when they became aware of the decision. In *Wuchter v. Pizzutti*, the defendant may have received actual notice of

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[2] 109 Nev 363, 849 P.2d 350 (1993).

the case against him, but the Court held that was not material. At p. 24.

(3) Although Pacific Reclamation cites no cases, its legal position is that the 30-day protest period ran against the Knudsens, as well as the 30-day appeal period in NRS 533.450 and the four-year statute of limitations in NRS 11.220. Pacific Reclamation apparently maintains that these statutes run, regardless of whether the State Engineer's decision was void.

There is a quantity of case law which refutes Pacific Reclamation's contention. In *Hilton v. Lincoln County*, 169 P.2d 329, 332 (Ore. 1946), the Court specifically ruled that the statute of limitations is inapplicable to protect void acts. In *Solmon v. Bishop*, 95 So.2d 318, 223 (Miss. 1957), the Court invalidated a lower court decree stating:

> " . . . In the absence of legal process, the decree was a nullity and could be wholly disregarded, and the lapse of time could not vest it with elements of validity. Therefore, the plea of the two-year statue of limitations and of laches and of res adjudicata presented by the appellants cannot be sustained."

In *Taylor v. Phillips Petroleum Company*, 295 S.W.2d 738, 742 (Tex. 1956) the Court held that a judgment entered without jurisdiction was void, subject to collateral attack at any time, and the statue of limitations did not bar the action. In *Moore v. Smith-Snagg*, 793 So.2d 1000, (Fla. 2001) the Court equated a forged deed with a wild deed which has no effect. "It will not divest title in the owner or create title in the grantee after four years or twenty years or forever." At p. 1003. The State Engineer's decision purporting to divest the Knudsens of their water rights was the legal equivalent of a wild deed in their

chain of title. It was a nullity which acquired no status or legitimacy over time.

The State Engineer in his Answering Brief expends no effort on the issue of whether his predecessor's decision was void. Instead he argues that the consideration of the 1945 decision is irrelevant, and should be relegated to the "underlying quiet title lawsuit." Brief p. 17.

No "underlying quiet title lawsuit" exists, and there is no reason for one. The Record on Appeal shows that the Howell ranch has changed hands 8 times since 1945 (1 J.A. 211). Obviously title to the Howell ranch in the Elko County Recorders Office is quite clear. In order to justify the State Engineer's failure to assign the water rights appurtenant to the Howell ranch, when presented with the clear chain of title, the State Engineer is forced to argue that the State Engineer's own 1945 decision created the only so-called "conflict" in the Howell ranch title.[3] The State Engineer's answering brief fails to address the issues pertaining to the validity of the State Engineer's 1945 decision at his own risk. If the decision is void, no conflict exists in the chain of title presented by the Howells. Neither the State Engineer nor the District Court may legally postpone consideration of this issue for some unfiled, unnecessary lawsuit.

It is not the wish of the Howells that this Court declare NRS 533.345 unconstitutional on its face. If the statute had been used in accord with the intent of the legislature, issues such as adequacy of notice would not

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[3] Pacific Reclamation recognizes that no other "conflict" exists in the Howells' chain of title in its Answering Brief at p. 7 ¶ 4-6 and p. 9 ¶ 20-23.

arise. This is because the statute was not intended to deprive people of their property rights. It is not a condemnation, contraband or tax foreclosure act. Its purpose is to allow the owner of a water right to relocate the point of diversion or place of use of his water right, not his neighbor's water right. If the Statute is used appropriately, there is no deprivation of property, and the constitutional notice standards would not be violated. In other words, statutory notice by publication would be adequate.

WHEREFORE, as set forth in Appellants' Opening Brief, it is respectfully requested this Court enter an order reversing in total the decision of the Honorable Richard Wagner dated May 21, 2002. Thus, the order shall require the State Engineer to alter his records to reflect that Michael T. and Cheri A. Howell are the owners of Claim No. 00608 of the Humboldt River Decree, appurtenant to 147.44 acres.

DATED: August 5, 2003.

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Supreme Court, U.S.
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In The
Supreme Court of the United States

MICHAEL T. HOWELL AND CHERI A. HOWELL,

Petitioners,

v.

HUGH RICCI, P.E., STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, AND PACIFIC RECLAMATION WATER COMPANY, A NEVADA CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Nevada

BRIEF IN OPPOSITION OF RESPONDENT PACIFIC RECLAMATION WATER COMPANY, A NEVADA CORPORATION

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QUESTIONS PRESENTED

Respondent Pacific Reclamation Water Company (Pacific Reclamation) disagrees with the Questions Presented by Petitioners Michael T. Howell and Cheri A. Howell (Howells) and believes the questions before this Court are actually as follows:

1. Whether the Nevada Supreme Court's reference to "due process" in its Order of Affirmance is mere *obiter dictum*, when its decision was based on the resolution of State law claims that independently preclude the Howells' requested relief, regardless of the merits of the due process claim.

2. Whether the Howells have standing to assert their procedural due process claim, when the claim is based on the alleged deprivation of procedural due process in 1945 by distant predecessors in title to the Howells' real property who are not parties to this action, and who themselves would have been prevented from bringing the Howells' procedural due process claim had they chosen to do so at the time this litigation was commenced due to statutes of limitation and repose.

3. Whether the Howells' due process claims are time-barred.

LIST OF PARTIES

The Petitioners correctly identify the parties.

CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29.6, Pacific Reclamation Water Company states that Pacific Reclamation Water Company is a privately held Nevada Corporation. None of its shares is held by a publicly traded company.

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STATEMENT OF THE CASE AND SUMMARY OF PROCEEDINGS

I. INTRODUCTION.

This lawsuit involves a challenge to an administrative transfer of water rights by the Nevada State Engineer that took place in northeastern Nevada almost 60 years ago. The water rights at issue consist of 116.43 acres that were adjudicated under Proof Number 00608 of the Humboldt Decree. Petitioners, Michael T. and Cheri A. Howell (Howells), who, on August 20, 1997, purchased the real property to which the water rights were previously appurtenant now seek to reverse a 1945 decision of the Nevada State Engineer which changed the place of use of this water, resulting in the water being moved from land that was then owned by Alonzo and Clair Knudsen (Knudsens), who are distant predecessors in title to the Howells' real property, onto land owned by shareholders of Respondent Pacific Reclamation Water Company (Pacific Reclamation).

Pacific Reclamation is a water company that was incorporated on April 8, 1911 to administer water for the benefit of its shareholders in the vicinity of Metropolis, Nevada. The Nevada State Engineer's 1945 decision to approve the applications changing the place of use of the water, referred to as Applications 11125 and 11127,[1] resolved applications which had been pending before the Nevada State Engineer since 1910 and, since 1945, Pacific Reclamation has relied on the Nevada State Engineer's decision, rightfully believing that the disputed water rights could be used to serve its shareholders.

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[1] The water rights at issue were contained in Applications 11125 and 11127. These Applications were subsequently approved and resulted in Certificates of Appropriation, which were recorded with the Elko County Recorder on February 16, 1945. (Pet. App. 69-80). However, for convenience, the term "Applications" will be used when collectively referring to the water rights transferred to Pacific Reclamation in 1945.

II. BACKGROUND.

On June 14, 1944, Pacific Reclamation filed two Applications for Permission to Change Point of Diversion, Manner of Use and Place of Use of the Public Waters of the State of Nevada Heretofore Appropriated, bearing the serial numbers 11125 and 11127 (hereinafter collectively referred to as the "Applications") with the Nevada State Engineer. (Pet. App. 45-64). Subsequently, the Nevada State Engineer published the Applications in the Wells Progress, a weekly newspaper published in Wells, Nevada, for five weeks, with the first publication on July 7, 1944 and the last publication on August 4, 1944. (Pet. App. 65-68). As noted in the Order of Affirmance, this was done in accordance with the public notice and filing requirements in effect at the time. (Pet. App. 8). On February 14, 1945, Application 11125 was granted by the Nevada State Engineer, as described in Certificate of Appropriation Number 2846 (Pet. App. 69-74) and on February 4, 1945, Application 11127 was granted by the Nevada State Engineer, as described in Certificate of Appropriation Number 2848. (Pet. App. 75-80).

At all relevant times, NRS 533.450 and its earlier versions have set forth fixed periods of time during which actions for judicial review of orders or decisions of the Nevada State Engineer had to be commenced in a proper court. In 1945, the statute that is now codified at NRS 533.450(1) and (3) read, in pertinent part, as follows:

> Any person feeling himself aggrieved by any order or decision of the Nevada State Engineer, acting in person or through his assistants or the water commissioners, affecting his interests, when such order or decision relates to the administration of determined rights or is made pursuant to sections 52 to 88, inclusive, of this act, may have the same reviewed by a proceeding for that purpose, in so far as may be in the nature of an appeal, which shall be initiated in the proper court of the county in which the matters affected or a portion thereof are situated. The proceedings in every case shall be heard and tried by the court, and shall be informal and

> summary, but full opportunity to be heard shall be had before judgment is pronounced. ***And no such proceeding shall be entertained unless notice thereof, containing a statement of the substance of the order or decision complained of, and of the manner in which the same injuriously affects the petitioner's interests, shall have been served upon the Nevada State Engineer, personally or by registered mail, at this office at the state capitol within thirty days following the rendition of the order or decision in question.*** A similar notice shall also be served personally or by registered mail upon the person or persons who may have been affected by such order or decision. . . . The decision of the Nevada State Engineer shall be *prima facie* correct, and the burden of proof shall be upon the party attacking the same.

Stats. 1913, c. 140, sec. 75, as amended Stats. 1915, c. 253, sec. 13. (Emphasis supplied) Thus, actions for judicial review of decisions or orders of the Nevada State Engineer became time-barred if the Nevada State Engineer was not given notice within 30 days of the rendition of the order or decision in question.

The record gives no indication as to whether the Knudsens had actual notice of the Applications during the 30 day period after the Applications were approved, nor is there any indication in the record that anyone protested the Applications after they were submitted and published or that anyone commenced judicial proceedings in a proper court to challenge the Nevada State Engineer's decision to approve them. However, the record does show that 17 years later, on June 18, 1962, Alonzo Knudsen, through his attorney Ross P. Eardley, questioned the Applications with the Nevada State Engineer. (Pet. App. 81-82). The Nevada State Engineer responded on June 22, 1962 by reaffirming the validity of the 1945 decision. (Pet. App. 83). The record also reflects that Royce Wood, a successor in title to the Knudsen's real property, made similar

inquiries in 1986, to which the Nevada State Engineer again responded by upholding the validity of the 1945 decision. (App. 1-4). There is no record that Mr. Wood took any further action.

In 1995, the Nevada Legislature added several new statutes to the Water Code, including NRS 533.386, as part of an effort to formalize the process for the approval of water right applications and permits by the Nevada State Engineer. NRS 533.386 requires the Nevada State Engineer to approve reports of conveyance once certain conditions are met, to include the condition that "no conflict exists in the chain of title that can be determined by the state engineer from conveyance documents or from other information on file in the office of the state engineer." NRS 533.386(1)(b). Conversely, NRS 533.386 also requires the Nevada State Engineer to reject a report of conveyance that is found to be deficient. NRS 533.386(2). As discussed in the Order of Affirmance, this statute only applies prospectively and does not affect water right applications that were approved prior to its enactment. (Pet. App. 1-12).

On or about August 19, 1997, the Hawks, who were Royce Wood's successors and the Howells' predecessors in title, filed a report of conveyance[2] with Nevada State Engineer pursuant to NRS 533.386 seeking to transfer the place of use of the water described in Applications 11125 and 11127 onto their own land; the Hawks amended their

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[2] The Howells refer to this document as the "Hawks'/Howells' report of conveyance." Petition for Writ of Certiorari, p. 5. That is a misstatement, however, since even though the report of conveyance was submitted the day before the Howells acquired the real property and even though there appears to have been some agreement between the Hawks and Howells concerning the water rights, only the Hawks actually submitted a report of conveyance and it was the Hawks and their counsel, John Marvel, not the Howells, who subsequently corresponded with the Nevada State Engineer in an effort to have the report of conveyance confirmed. (App. 5-16). The details of the arrangement between the Hawks and the Howells were not presented in the proceedings below.

report of conveyance on March 19, 1998.[3] (App. 8-9). On February 11, 1999, Ms. Lisa B. Schettler, an Engineering Technician with the Nevada State Engineer, issued a letter denying the Hawks' request to transfer the waters described in the Applications onto their property and, again, reaffirming the validity of the 1945 decision to approve the Applications. (App. 12-14). There is no record that this reaffirmation was disputed by the Hawks until May 25, 1999, when Mr. Marvel, the Hawks' attorney, sent a letter to the Nevada State Engineer challenging the February 11, 1999 letter. (App. 15-16). Nevertheless, no petition for judicial review was filed with respect to the Nevada State Engineer's February 11, 1999 letter.

On June 15, 1999, Barbara Kightlinger, a Management Assistant with Nevada State Engineer, sent a letter to the Hawks in error that, on its face, appeared to contradict the February 11, 1999 letter by stating that the water

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[3] In their Petition for Writ of Certiorari, the Howells place great weight on the documents supporting their claim that they have a superior chain of title to the water rights than does Pacific Reclamation. However, as is discussed elsewhere in this Brief in Opposition, in Nevada, title to real property does not necessarily correlate to title water rights, since water rights can be moved from one piece of property to another through an administrative act of the Nevada State Engineer without any documents ever being recorded outside of the agency's own records. Nevertheless, in an effort to advance this misleading argument, the Howells mischaracterize the Nevada State Engineer's June 22, 1962 letter to Alonzo Knudsen's attorney, Ross P. Eardley, indicating that the letter contains a statement by the Nevada State Engineer that "Pacific Reclamation had acquired [the water rights] by virtue of a Quitclaim Deed dated June 5, 1944." (Petition for Writ of Certiorari, p. 3). However, that is not what the Nevada State Engineer's letter stated. Rather, in that letter, the Nevada State Engineer merely indicated that the June 5, 1944 Quitclaim Deed from Cooperative Security Corporation to Pacific Reclamation "confirmed" Pacific Reclamation's ownership of these rights. Pacific Reclamation acquired ownership of the water rights by virtue of the Nevada State Engineer's administrative act of transferring the water rights onto property owned by Pacific Reclamation's shareholders by approving the Applications in 1945, not upon the conveyance of any real property by deed.

rights had been assigned to show the Hawks as the owners. However, this letter, which appears to have been essentially a standard form letter routinely sent to applicants, further stated that the assignment was "subject to amendment upon receipt of additional information." (Pet. App. 84-85). On July 19, 1999, Mrs. Kightlinger sent another letter to the Hawks rescinding the June 15, 1999 letter and upholding the validity of the Applications. (Pet. App. 30-31).

III. JUDICIAL PROCEEDINGS.

On August 18, 1999, the Howells commenced this litigation by filing a "Petition for Judicial Review from Order or Decision of Nevada State Engineer (NRS 533.450)" challenging the "decision" of the Nevada State Engineer contained in the July 19, 1999 letter.[4] On or about November 20, 1999, the Howells filed a "Second Amended Petition for Judicial Review." (Pet. App. 86-96). Pacific Reclamation timely filed a responsive pleading. During the District Court proceedings, the court ordered the parties to submit briefs stating their positions and a trial was conducted on April 22, 2002. The Howells did not argue that the Knudsens had been deprived of procedural due process, but instead relied on the 1995 amendments to the Water Code, particularly NRS 533.386, in arguing that their superior chain of title to the real property provided legal and equitable grounds for moving the water rights back to where they were prior to the approval of the 1945 Applications. In response, Pacific Reclamation argued that NRS 533.386 only applied prospectively and that the Howells were procedurally barred from bringing their claim for a number of reasons. The Nevada State Engineer argued that it found a conflict in the chain of title to exist

[4] In its Order of Affirmance, the Nevada Supreme Court held that "[t]he implied ruling contained within the State Engineer's July 19, 1999 letter did not constitute a final determination as to the ownership of the subject water rights that would be subject to review under the Nevada Administrative Procedures Act." (Pet. App. 8).

because Pacific Reclamation was shown to be the owner of the water rights in its records, while the chain of title to the real property appeared to indicate that the water rights were still on the property that the Howells purchased. Thus, NRS 533.386 prevented the Nevada State Engineer from confirming the Hawks' report of conveyance. Both Pacific Reclamation and the Nevada State Engineer also argued that the failure of the Knudsens to file a petition for judicial review within 30 days after the Applications were approved in 1945, a requirement under the version of NRS 533.450 that was in effect at the time, was a procedural bar to their claim.

On May 23, 2002, the District Court entered its Findings of Facts, Conclusions of Law and Judgment in which it denied the Howells' requested relief, holding as follows:

1. That the Howells are procedurally barred pursuant to NRS 533.450(1) and (3) from petitioning the Court for judicial review of the Nevada State Engineer's February 14, 1945 decision to grant Applications 11125 and 11127; and

2. That a conflict exists in the chains of title of the Howells and Pacific Reclamation, respectively, which prohibits the Nevada State Engineer from confirming the Howells' report of conveyance pursuant to NRS 533.386; therefore, the Court sustained the decision of the Nevada State Engineer to reject the Howells' report of conveyance.

Each of these holdings provided an independent basis for denying the Howells' their requested relief and the District Court did not consider the Howells' request for equitable relief.

(Pet. App. 13-29).

The Howells appealed the District Court's decision and, on April 1, 2003, the Nevada Supreme Court entered its Order of Affirmance, agreeing with the District Court in a decision signed by all seven Justices. (Pet. App. 1-12). In its decision, the Nevada Supreme Court held as follows:

> We affirm the district court judgment dismissing the Howells' petition for judicial review and affirming the State Engineer's decision to deny the

> report of conveyance. We conclude that: substantial evidence supported the State Engineer's decision; the district court correctly concluded that the Howells' petition was procedurally barred; and equitable relief is not warranted in this case.

(Pet. App. 10).

The Nevada Supreme Court also included the following footnote at the conclusion of its opinion:

> In light of our disposition of the other issues litigated in this appeal, we reject the Howells' claim that the original 1944 permits are void for lack of procedural due process.

(Pet. App. 11).

REASONS FOR DENYING REVIEW

I. INTRODUCTION.

Despite the Howells' attempt to re-characterize this case as involving significant procedural due process issues, it does not. This case is fundamentally about the application of two Nevada statutes contained in the Nevada Water Code, the first being a 1995 statute that prevents the Nevada State Engineer from confirming reports of conveyance where there is found to be a conflict in the chain of title and the second being a statute of repose that prevents aggrieved persons from seeking judicial review of decisions and orders of the Nevada State Engineer after 30 days. Other than the Nevada Supreme Court's decision not to grant the Howells' request for equitable relief, these two statutes form the basis for the Nevada Supreme Court's decision and, although there is a brief reference to "due process" in a footnote to the Order of Affirmance, that reference is *obiter dictum* and does not raise any constitutional issues warranting review. Moreover, the procedural due process claims described in the Petition for Writ of Certiorari are barred under the statute of limitations and the Howells lack both Article III and prudential standing to raise these claims.

II. THE NEVADA STATE ENGINEER WAS PREVENTED BY STATUTE FROM CONFIRMING THE HAWKS' REPORT OF CONVEYANCE BECAUSE OF A CONFLICT IN THE CHAIN OF TITLE.

At issue in this case is the correctness of the Nevada State Engineer's decision not to confirm the Hawks' 1998 report of conveyance and the ability of the Howells, as a matter of procedure, to obtain judicial review of that decision. Ownership of water rights in Nevada is unlike ownership of land in the sense that it is subject to administrative control by the Nevada State Engineer. Rather than being ownership of the water itself, ownership of a Nevada water right is actually ownership of no more than the ***right to use*** the public waters of the State of Nevada in accordance with a permit that is issued by the Nevada State Engineer. *See generally* NRS Chapter 533; *Application of Filippini*, 66 Nev. 17, 21-2, 202 P.2d 535 (1949). While title to real property certainly can include appurtenant water rights and while an unbroken, recorded chain of title to real property is superior to one that is incomplete or unrecorded, title to a water right does not necessarily pass from one person to another in the same manner as title to real property. Rather, under Nevada law, a water right can be divested from the real property to which it is appurtenant and may then be placed on completely different real property by a purely administrative act of the Nevada State Engineer. NRS 533.345, *et seq.* While that administrative decision would be recorded in the Office of the Nevada State Engineer (NRS 532.150(1)),[5] unlike title to land, there is no requirement that such a decision must also be recorded with the county recorder in order to be effective although, in this case, the record shows that the Certificates of Appropriate corresponding to the

[5] NRS 532.150(1) provides: "The records of the office of the State Engineer are public records and shall remain on file in his office and be open to the inspection of the public at all times during business hours." This statute was enacted in 1913.

Applications were, in fact, filed with the Elko County Recorder on February 16, 1945. (Pet. App. 70 and 76).

As the District Court observed during the proceedings below, Nevada water law has become stricter over time. (App. 17-18) However, at no point in time has the Nevada State Engineer been under a statutory obligation to make determinations as to the quality of the title to real property to which water rights are appurtenant prior to confirming applications and permits changing the place of use of water, although it historically appears to have been an informal policy of the Nevada State Engineer to do so, at least to a certain extent. Nevertheless, because disputes over ownership of water rights are frequently intertwined with disputes over title to real property, the Nevada State Engineer was often placed in the position of resolving competing claims to water rights based on conflicting chains of title to real property, which was beyond the Nevada State Engineer's area of expertise.

In 1995 the Nevada Legislature enacted NRS 533.382 through .387. These statutes effectively removed any unintended role the Nevada State Engineer might have had in quieting title to real estate and appurtenant water rights by establishing a somewhat rigorous requirement on the part of water right applicants to provide documentation showing that their title to the water rights was not in conflict with (as opposed to superior to) someone else's. NRS 533.386. Due to the passage of that statute, title must now be demonstrated by deeds or any other documentation showing that the applicant has title to the water by virtue of the water being appurtenant to real property which, in turn, is supported by a clear chain of title. NRS 533.382 through .384. However, no language in these statutes gives them any retroactive effect and there is no indication that disputes over ownership of water rights resolved by the Nevada State Engineer prior to 1995 were in any way affected by their enactment.

The Howells' Petition for Writ of Certiorari fails to recognize that regardless of whether the Knudsens were deprived of procedural due process in the mid-1940's,

either by lack of adequate notice or due to the impairment of existing rights, the Nevada State Engineer was statutorily prevented from confirming the Hawks' report of conveyance, which was submitted in 1997, since NRS 533.386(1)(b) states, in pertinent part, that the Nevada State Engineer shall only approve a report of conveyance if he or she determines that "[n]o conflict exists in the chain of title that can be determined by the state engineer from the conveyance documents or from other information on file in the office of the state engineer." NRS 533.386(3) further provides, in pertinent part, that if "the state engineer determines that the report of conveyance is deficient, he shall reject the report of conveyance and return it to the person who submitted it." As the District Court pointed out, the "intent of this provision was to take the State Engineer out of the position of resolving title disputes." (Pet. App. 23).

The District Court also observed that if there is substantial evidence to support the Nevada State Engineer's determination that a report of conveyance should be rejected because a conflict exists in the chain of title, then the determination must be upheld. (Pet. App. 23). The Nevada Supreme Court agreed that the substantial evidence standard was the correct standard to apply, and both the District Court and the Nevada Supreme Court found that the Nevada State Engineer was presented with a conflict in the chain of title when the Hawks presented their report of conveyance, since the records of the Nevada State Engineer's Office indicated that the water rights had been taken off the Knudsens' lands through Applications 11125 and 11127 in 1945 and now belonged to Pacific Reclamation. Thus, the Nevada State Engineer was obligated under NRS 533.386 to reject the Hawks' report of conveyance, regardless of whether the Knudsens were given adequate notice and regardless of the statutory authority of the Nevada State Engineer to approve the Applications decades earlier. NRS 533.386 was intended to keep the Nevada State Engineer out of resolving such disputes by rejecting reports of conveyance where there

are found to be conflicts in title and that is exactly what occurred in this case.

III. THE HOWELLS' DUE PROCESS CLAIMS ARE PROCEDURALLY BARRED UNDER NRS 533.450.

In addition to the requirements of NRS 533.386, both the District Court and the Nevada Supreme Court recognized that the Howells' various challenges to the Nevada State Engineer's 1945 decision to grant Applications 11125 and 11127 are procedurally barred pursuant to NRS 533.450. (Pet. App. 10 and 28-29). NRS 533.450 establishes the procedure by which a person aggrieved by a decision or order of the Nevada State Engineer granting or denying a record of conveyance may obtain judicial review. Repose is one of the functions of this statute, since it requires an aggrieved person to seek judicial review of a final order or decision of the Nevada State Engineer within 30 days. There does not appear to be any basis for tolling this statute of repose and the Howells do not argue otherwise. Moreover, even if there were grounds for somehow tolling the 30 day statute of repose following the Nevada State Engineer's 1945 decision, certainly any such tolling period would have expired in 1962 when the Knudsen's attorney questioned the 1945 decision, since any challenge to the decision could have been made then.

In an effort to circumvent this issue, the Howells argued before the lower courts that their Petition for Judicial Review was timely filed on August 18, 1999 and was not barred by the 30 day limit contained in NRS 533.450 because their appeal involved the Nevada State Engineers's July 19, 1999 decision not to confirm their report of conveyance within 30 days pursuant to NRS 533.382, rather than the Nevada State Engineer's 1945 decision to approve Applications 11125 and 11127. The Howells argued that their report of conveyance complied with NRS 533.382 in all pertinent respects, that the Nevada State Engineer initially confirmed the report of conveyance on that basis and that it was the Nevada State Engineer's "rescission" of that assignment of water rights

that was being challenged. Therefore, argued the Howells, their Petition for Judicial Review was timely filed.

However, the facts do not support this argument. As stated, in 1999, the Nevada State Engineer wrote three separate letters to the Howells' immediate predecessors-in-interest (the Hawks):

1. The first of these three letters, dated February 11, 1999, was a written decision denying the Hawks' request to transfer the disputed water onto their property; this letter reaffirmed the validity of Applications 11125 and 11127. (App. 12-14).

2. The second letter, dated June 15, 1999, stated that the waters had been assigned to show the Hawks as the owners "subject to amendment upon receipt of additional information." (Pet. App. 84-85).

3. The third letter, dated July 19, 1999, which is the letter that the Howells argue gave them the right to judicial review, in fact merely rescinded the June 15, 1999 letter and continued to reaffirm the 1945 decision, as the Nevada State Engineer had done a number of times previously. (Pet. App. 30-31).

The threshold issue to be considered in this regard is whether the July 19, 1999 letter resulted in an appealable decision or order within the meaning of NRS 533.450. In order for any claim brought by the Howells not to have been time-barred, the June 15, 1999 letter would have to constitute a final decision or order, since the Howells argued that the July 19, 1999 letter represented a change in the agency's position from the June 15, 1999 letter. It logically follows, therefore, that the Howells were arguing, at least by implication, that ***both*** the June 15, 1999 and July 19, 1999 letters represented separate final agency actions.

Although NRS Chapter 533 does not define precisely what constitutes an appealable "decision" or "order," it is generally recognized that an agency's decision or order is not appealable until it is final. As was stated by the Pennsylvania Supreme Court in *Pennsylvania Labor Relations Board v. Puritan Cleaners*, 103 A.2d 904, 905

(Penn. 1954) in deciding that an administrative order was not final and, thus, not subject to appeal:-

> An order is not final until it definitively and conclusively disposes of a pending action. The braid of litigation must end in a firm knot which ties every strand of the controversy so that nothing is left to conjecture, surmise or additional inquisition.

Id. Moreover, in order to be appealable, an "order" must generally "adjudicate a right or impose a duty on a party." *See Forney v. Apfel*, 524 U.S. 266, 267 (1998); *Barr v. State Compensation Department*, 463 P.2d 871, 873 (Ore. 1970). Similarly, agency "decisions" are not considered appealable unless they involve some judicial act. Purely ministerial decisions, administrative acts and agency recommendations, which do not deprive anyone of rights, are not considered to be final decisions subject to judicial review. Moreover, if something further remains to be done before the agency decision becomes final, it is not an appealable decision. *McGraw v. Marion County Plan Commission*, 174 N.E.2d 757, 760-1 (Ind. 1961).

Following these principles, the June 15, 1999 letter, while perhaps giving the Hawks the initial impression that their report of conveyance had been approved, did not actually constitute a final decision. Rather, this letter was in keeping with NRS 533.375 which states, in pertinent part, that "[b]efore either approving or rejecting [an] application, the Nevada State Engineer may require such additional information as will enable him to guard the public interest properly." Therefore, while the Nevada State Engineer had apparently performed some sort of administrative or ministerial act by changing certain documents to show the Hawks as the owners of the disputed water rights and sending out a standard letter to that effect, the Nevada State Engineer had not yet formally approved or rejected the Hawk's application. It should also be recognized that this letter ***could not*** have changed the place of use of the disputed waters onto the Hawks' property, which would have effectively divested Pacific Reclamation of its recognized water rights, since no notice had been published in accordance with NRS

533.360 and since Pacific Reclamation had not been given an opportunity to be heard. In short, the July 19, 1999 letter in which the Nevada State Engineer rescinded the June 15, 1999 letter could not have constituted a decision to reverse a prior decision granting the Hawks' application, since there was no such prior decision to reverse.

The next issue, therefore, is whether the July 19, 1999 letter, through the act of reaffirming the Nevada State Engineer's 1945 decision, opened the door to a new challenge to the 1945 decision, despite the time limits on commencing actions for judicial review contained in NRS 533.450 and its earlier versions. In the Order of Affirmance, the Nevada Supreme Court found that it did not, stating, "The implied ruling contained in the State Engineer's July 19, 1999 letter did not constitute a final determination as to the ownership of the subject water rights that would be subject to review under the Nevada Administrative Procedures Act." (Pet. App. 8). This finding is consistent with cases from a number of jurisdictions holding that a statute of repose bars actions that are commenced past the expiration of the time limit contained in the statute, even if the action is based on irregularities in the proceedings. Significantly, a later decision to reaffirm the time-barred decision does not reset the clock for commencing an action. Once the time for filing suit expires, aggrieved parties are forever barred from bringing an action based on challenges to the original decision. *Wright v. Town of Kennebunkport*, 715 A.2d 162 (Maine 1988) (alleged illegality of permit at time of issuance does not toll appeal period in statute of repose; affected parties could have discovered illegality through reasonable diligence and individuals relying on permit must be able to rely on permit with confidence); *United Parcel Service v. People's Counsel for Baltimore County, Md.*, 650 A.2d 226 (1994) (letter from zoning commissioner explaining and defending previous decision to approve application for building permit did not constitute appealable event); *Kolodny v. Board of Appeals of Brookline,* 191 N.E.2d 689 (1963) (building commissioner's decision letter

denying request to revoke building permits not a "decision" from which appeal may be taken, but rather, is a reaffirmation of the prior decision to issue the permits).

The Nevada Supreme Court has recognized that statutes such as NRS 533.450 and its 1945 equivalent are statutes of repose. As stated in *G and H Associates v. Hahn*, 113 Nev. 265, 271, 934 P.2d 229 (1997) and *Alsenz v. Twin Lakes Village, Inc.*, 108 Nev. 1117, 1120, 843 P.2d 834 (1992) both quoting *Allstate Ins. Co. v. Furgerson,* 104 Nev. 772, 775 n.2, 766 P.2d 904, 906 n.2 (1988):

> "Statutes of repose" bar causes of action after a certain period of time, regardless of whether damage or an injury has been discovered. In contrast, "statutes of limitation" foreclose suits after a fixed period of time following occurrence or discovery of an injury.[6]

Ibid. Accordingly, NRS 533.450 and its earlier versions operate as a procedural bar to any future causes of action filed after the time period specified in the statute. *See, e.g., Armburst v. United Tel. Co. of Ohio, Inc.,* 695 N.E.2d 823 (Ohio 1997) (statute of repose is absolute bar to cause of action filed after specified time period, regardless of when action accrued); *Hill v. Fordham*, 367 S.E.2d 128 (Ga. App. 1988) (statute of repose cannot be tolled to permit actions to be brought for injuries which did not occur until after statutory period had expired); *Peterson, ex rel. Peterson v. Burns*, 635 N.W.2d 556 (S.D. 2001) (a statute of repose

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[6] A statute of repose, which can never extend but can shorten the applicable statute of limitation, may cut off the right of action before the injured party discovers or reasonably should have discovered the injury. "[A] cause of action can simultaneously accrue for purposes of the statute of repose and statute of limitations; however, the cause of action will usually accrue for statute of limitation purposes after it has accrued for statute of repose purposes." *G and H Assocs.*, 113 Nev. at 272. Significantly, however, while a statute of limitations extinguishes the availability of a remedy, a statute of repose actually extinguishes the underlying right itself. *Flannigan v. W.C.A.B. (Colt Industries)*, 726 A.2d 424 (Pa. Cmwlth. 1999); *Wyatt v. A-Best Products Co.*, 924 S.W.2d 98 (Tenn. Ct. App. 1995).

bars all actions after a specific period of time has run from the occurrence of some event other than the occurrence of an injury that gives rise to a cause of action); *Friends of Clark Mountain Foundation, Inc. v. Board of Sup'rs of Orange County*, 406 S.E.2d 19 (Va. 1991) (statute of repose involves legislatively mandated limitation which reflects policy determination that point in time arrives beyond which defendant should be immune from liability for past conduct).

As with a statute of limitation, one of the principal purposes of a statute of repose is to protect persons from having to endure unending liability. *See Alsenz*, 108 Nev. at 1120. As this Court stated in *United States v. Kubrick*, 444 U.S. 111, 117 (1979), repose statutes afford "plaintiffs what the legislature deems a reasonable time to present their claims" while protecting "defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *Id.* (Citations omitted).[7] "[T]he failure to seek review of an

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[7] With respect to the Howells' argument that notice by publication, which was the only notice required under the relevant portion of the Water Code at the time the Applications were approved in 1945, was unconstitutional without there also being a reasonable effort to provide actual notice, the Howells only ***speculate*** that the Knudsens were not provided actual notice of Applications 11125 and 11127 before they were approved in 1945. The record simply does not indicate whether the Knudsens had actual notice during that time frame and they might just as easily as not have had actual notice before the Applications were approved. The record also does not indicate whether the Knudsens exercised reasonable diligence to inquire as to the status of the water rights during that time frame and there is nothing to show that the existence of the Applications could not have been readily discerned by examining the Nevada State Engineer's records. Rather, the facts in the present case demonstrate that, in 1944, the Nevada State Engineer complied with all then-applicable notice requirements in approving Applications 11125 and 11127 and, for all we know today, the Knudsens may very well have seen the notices in the Wells Progress at the time they were published, recognized their water rights and simply decided not to act. This, of course, involves speculation, but no more speculation

(Continued on following page)

administrative agency decision within the time and in the manner provided by [the statute] results in the decision becoming final and not subject to judicial review for mere legal error or factual insufficiency." *Guminski v. Arizona State Veterinary Medical Examining Board*, 33 P.3d 514, 516 (Ariz. App. 2001) (quoting *State ex rel. Dandoy v. City of Phoenix*, 651 P.2d 862, 865 (Ariz. App. 1982)). Once the agency makes a decision and the statutory time period for protesting and seeking judicial review have passed, the matter cannot later be revived by seeking a redetermination of the decision. As stated in *Guminski*, "The term 'decision' does not apply to the [agency's] ruling on requests for rehearing or review and we find no intent in the statutes or rules to allow potentially limitless extensions of the time to seek judicial review resulting from repeated denials of rehearing, review or reconsideration." *Guminski*, 33 P.3d at 517.

It should also be noted that a statute of repose creates a substantive right that cannot later be modified so as to divest a person of that right. *Wiley v. Roof*, 641 So. 2d 66, 68 (Fla. 1994) (once an action is barred, a property right to be free from a claim has accrued); *Duran v. Henderson*, 71 S.W.3d 833 (Tex. App. 2002) (a statute of repose creates a substantive right in those protected to be free from liability after a legislatively-determined period). A statute of repose also serves the purpose of allowing a potential defendant to readily determine his rights on a fixed date, thus serving the need for finality. *Sterlin v. Biomune Systems*, 154 F.3d 1191, on remand 114 F. Supp. 2d 1163 (10th Cir. 1998). Indeed, allowing a person to revive an action otherwise time-barred by a statute of repose by merely reasserting the action with cosmetic differences

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than that which is engaged in by the Howells. It would certainly appear that this case presents a classic example of why repose statutes are necessary, demonstrated by the Howells' efforts to use innuendo in order to create a hypothetical scenario about events of over a half-century ago, a scenario which can neither be supported nor rebutted through evidence due to the deaths or disappearances of witnesses and, quite possibly, through the loss of documents as well.

would effectively eviscerate the purpose behind the statute. *See, e.g., Carolina Indus. Prods., Inc. v. Learjet, Inc.*, 189 F. Supp. 2d 1147, 1170-71 (D. Kan. 2001); *Butchkosky v. Enstrom Helicopter Corp.*, 855 F. Supp. 1251, 1257 (S.D. Fla. 1993) (a Federal statute of repose pertaining to aircraft accident cases is not revived by the re-issuance or alteration of maintenance manuals during the period of repose). In sum, because any challenges that might have been made to the 1945 decision to approve the Applications were not made within the 30 day time limit set forth in the 1945 version of NRS 533 450, those challenges are no longer actionable.

IV. THE REFERENCE TO DUE PROCESS IN THE ORDER OF AFFIRMANCE IS *OBITER DICTUM*.

In the Order of Affirmance, the lower court clearly and specifically outlined the bases for its decision in the Conclusion to the opinion, as follows:

> We affirm the district court judgment dismissing the Howells' petition for judicial review and affirming the Nevada State Engineer's decision to deny the report of conveyance. We conclude that: substantial evidence supported the Nevada State Engineer's decision; the district court correctly concluded that the Howells' petition was procedurally barred; and equitable relief is not warranted in this case.

(Pet. App. 10). None of these listed bases for the decision involved the resolution of constitutional or other federal issues in any respect, but were entirely based on State law. Nevertheless, despite this unequivocal language, the Howells now argue that the Nevada Supreme Court "has decided an important federal question in a way that conflicts with long standing decisions of the Supreme Court of the United States."The Howells base this statement exclusively on the following footnote in the lower court's opinion:

> *In light of our disposition of the other issues litigaed in this appeal*, we reject the Howells' claim that the original 1944 permits are void for lack of procedural due process.

(Pet. App. 11). However, that reference to "due process" was nothing more than *obiter dictum*. The Nevada Supreme Court did not resolve any due process issues in its decision and nothing contained in the Order of Affirmance could have any precedential impact on that subject.[8]

As this Court is aware, a dictum is a statement which is not "necessary" to a court's decision. *Church of the Lukumi Babalu Aye, Inc. v. Church of Hialeah*, 508 U.S. 520, 572-3 (1993) (Souter, J., concurring in part and concurring in the judgment).

> "A dictum has . . . been defined as an opinion expressed on a point in which the judicial mind is not directed to the precise question necessary to be determined to fix the rights of the parties, or an opinion of a judge which does not embody the resolution or determination of the court, and made without argument, or full consideration of the point, not the professed deliberate determination of the judge himself.

21 C.J.S. *Courts* § 142. Certainly, while a given case might have any number potential rationales for the result, in order for the law to consist of more than an arbitrary collection of facts and outcomes, courts must be able to distinguish between what they deem relevant and what they deem irrelevant. In the present case, the only logical interpretation of the lower court's use of the prefatory language "[i]n light of our disposition of the other issues litigated in this appeal" is that the court did not intend to rule on the Howells' due process claim because it was unnecessary to do so in light of the resolution of the

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[8] The Howells state that "[t]he Court apparently connects the due process issues in some way to the 'other issues' addressed in its Order, but the footnote offers no further explanation." Petition for Writ of Certiorari, p. 11. However, it is only logical to conclude that the "connection" between due process and the "other issues" is that the resolution of the "other issues" rendered it unnecessary to consider the Howells' due process arguments on their merits.

Howells' State claims. Indeed, the statement in Footnote 24 does not even identify which of the Howells' two due process arguments it supposedly resolved (e.g., "inadequate notice to property owner" versus "misuse of Nevada's water statutes"), much less express an opinion one way or another as to whether the Howells might have prevailed on either or both of these arguments had they been considered. Moreover, even if the lower court had considered one or both of the Howells' due process arguments, the result would have been of no import, since the Nevada State Engineer was unable to confirm the Hawks' report of conveyance by statute and since the Howells were procedurally barred from bringing the claim in the first place.

Because the statement only appears as an aside and is extraneous to the lower court's ruling, the reference to "due process" in Footnote 24 is mere dictum, having no precedential effect, and can only be interpreted to mean that the lower court did not believe it was necessary to consider the Howells' due process arguments in light of the resolution of the State law claims. Accordingly, any decision this Court might make as to the propriety of the lower court's decision not to consider the Howells' due process arguments would involve the interpretation of an "abstract, hypothetical or contingent" question, in violation of Article III's case-or-controversy requirement. *Alabama State Fed'n of Labor v. McAdory*, 325 U.S. 450, 461 (1945).

V. THE HOWELLS' DUE PROCESS CLAIMS ARE BARRED UNDER THE STATUTE OF LIMITATIONS.

As is discussed above, there is no dispute that Alonzo Knudsen knew about the Applications at least by 1962. However, even assuming arguëndo that 1962 is when Mr. Knudsen first learned about the Applications, NRS 11.220, which is a "catch-all" statute of limitation requiring that actions not otherwise provided for must be commenced within four years after the accrual of the cause of action, barred a constitutional challenge to the Nevada State

Engineer's decision to grant the Applications no later than 1966.

This Court recognized in *Kubrick*, supra, 444 U.S. at 123 that even where a plaintiff does not know he has a right of action, once the plaintiff is "armed with the facts about the harm done to him," he can protect himself by seeking legal advice. In this case, the record clearly shows that the Knudsens ***did*** seek legal advice, since it was their attorney, Ross P. Eardley, who wrote the 1962 letter to the Nevada State Engineer concerning the 1945 decision. As this Court stated in *Kubrick*, "[t]o excuse [a plaintiff] from promptly doing so by postponing the accrual of his claim would undermine the purpose of the limitations statute, which is to require the reasonably diligent presentation" of claims. *Id.* The record provides no basis for tolling the statute of limitations between 1966 and 1999, which is when the Howells commenced this lawsuit, and this statute of limitations operates as an independent bar to the Howells' action.

Interestingly, the Howells have not argued otherwise throughout the course of these proceedings but, as discussed, have instead attempted to fashion their case in such a manner as to make it appear to be a challenge to the Nevada State Engineer's refusal to confirm the Hawks' report of conveyance 1999 rather than the 1945 decision to grant the Applications, even though the 1999 reaffirmation involves exactly the same water rights. That argument, however, is nothing more than a loosely-veiled disguise in an effort to impermissibly attack a 58-year-old decision.[9] Certainly, to allow the Howells' substantive challenges to the Applications to proceed on that basis,

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[9] As this Court has held, "the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury cause by old overt acts outside the limitations period." *Klehr v. A.O. Smith Corporation*, 521 U.S. 179, 187-9 (1997) (holding that applying "last predicate act rule" to civil RICO actions would create a limitations period that is longer than Congress could have contemplated, because a series of predicate acts can continue indefinitely, thus lengthening the limitations period dramatically).

particularly in light of the fact that the Howells' predecessors could have made the very same arguments decades ago, would nullify the statute of limitations and would have the potential to open the door to a multitude of potential suits that have long been thought to be time-barred.

The Howells also argue that the Nevada State Engineer's 1945 decision was void because it deprived the Knudsens of procedural due process. Therefore, argue the Howells, this Court is free to set aside the decision at any time, irrespective of repose statutes. Along these same lines, the Howells argue, at least in part, that *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950) should be applied retroactively so as to render the Applications void *ab initio*. Thus, it appears that according to the Howells, the temporal relationship between the events of this case should not be considered. That, however, is inconsistent with several of this Court's decisions.

With respect to the issue of whether *Mullane* should be applied retroactively to the 1945 Applications, this Court held as follows in *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 97 (1993):

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

Id. Nonetheless, "[n]ew legal principles, even when applied retroactively, do not apply to cases already closed." *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758 (1995) (comparing *United States v. Estate of Donnelly*, 397 U.S. 286, 296 (1970) (Harlan, J., concurring) (at some point, "the transaction has acquired such a degree of finality that the rights of the parties should be considered frozen. . . . [I]n the civil area that moment should be when the transaction is beyond challenge . . . because the statute of limitations has run"). This rule was applied in *Cipriano v.*

City of Houma, 395 U.S. 701 (1969), a case involving the constitutionality of provisions of Louisiana law which gave only "property taxpayers" the right to vote in elections called to approve the issuance of revenue bonds by municipal utilities. In *Cipriano*, this Court invalidated the challenged statute, but was then faced with the issue of whether the ruling should be applied retroactively. In deciding that it should not, this Court stated, "we will apply [our decision] only where, under state law, the time for challenging the election result has not expired, or in cases brought within the time specified by state law for challenging the election and which are not yet final." *Id.* at 706. Here, the four year statute of limitations contained at NRS 11.220 barred any constitutional challenges to the Applications no later than 1966. The record provides no basis for tolling the statute of limitations between 1966 and 1999, which is when the Howells commenced this lawsuit. Thus, even if this Court were to apply the holding in *Mullane* retroactively to the process by which the Applications were published and approved in 1945, the Howells' claim would still be time-barred.

Finally, it should be noted that "[t]he right to assert the statute of limitations as a complete defense is considered to be property within the protection of a constitutional guaranty of due process of law." 51 Am. Jur. 2d, *Limitation of Actions* § 4. Thus, if any party has a right to assert a due process argument, it is Pacific Reclamation. Pacific Reclamation has a constitutionally-protected property interest in the water rights at issue in this case and has had the right to rely on NRS 11.220 as a statute of limitations and 533.450 (along with its earlier versions) as a statute of repose since 1945. In short, granting the Howells' requested relief based on constitutional deprivations that allegedly occurred in 1945 would deprive Pacific Reclamation of valuable property rights conferred upon it by NRS 11.220 and 533.450.

VI. THE HOWELLS LACK STANDING TO RAISE THEIR PROCEDURAL DUE PROCESS CLAIMS.

The Howells also lack both Article III and prudential standing to bring their due process claims, which challenge the level of notice that was given to the Knudsens prior to the approval of the Applications and the statutory authority of the Nevada State Engineer to approve the Applications in 1945. Article III standing requires that the litigant allege an "injury in fact . . . that is, a sufficiently concrete interest in the outcome of their suit to make it a case or controversy subject to a federal court's Art. III jurisdiction . . . " *Singleton v. Wulff*, 428 U.S. 106, 112 (1976). "[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.'" *Valley Forge College v. Americans United*, 454 U.S. 464, 471 (1982) (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979)). As stated in *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 663-4 (1993):

> It has been established in a long line of cases that a party seeking to invoke a federal court's jurisdiction must demonstrate three things: (1) injury in fact, by which we mean an invasion of a legal protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the challenged conduct, by which we mean that the injury fairly can be traced to the challenged action of the defendant, and has not resulted from the independent action of some third party not before the court; and (3) a likelihood that the injury will be redressed by a favorable decision, by which we mean that the prospect of obtaining relief from the injury as a result of a favorable ruling is not too speculative. These elements are the irreducible minimum, required by the Constitution.

Id. (Quotation marks and citations omitted); *McConnell v. Federal Election Commission*, 124 S. Ct. 619, 708 (2003) (applying Article III standing rule).

In the present case, while the Howells allege that the Knudsens were deprived of procedural due process and that the Nevada State Engineer acted without authority in 1945, there is nothing to show that Howells were even born when the Applications were approved, much less that they suffered some "injury in fact" as a result. Rather, the facts demonstrate that the Howells purchased their real property many years later knowing full well that the water rights at issue in this case had been previously taken off the property. Thus, the Howells themselves did not suffer an injury, regardless of whether the Knudsens did, and any causal connection between the Knudsens and the Howells through the chain of title to the real property is too tenuous to be fairly traceable to the Nevada State Engineer's 1945 decision. Moreover, it would appear that the constitutional injury claimed by the Howells resulted, at least in large part, from the Knudsens' decision not to pursue a claim when they owned the property. Of course, the Knudsens are not before this Court.

The Howells' reasoning suggests that by purchasing real property, a purchaser automatically obtains Article III standing to file any constitutional claims relating to the property that might have been brought by anyone else who might have owned or had an interest in the property at some time in the past. The impact of such a result would certainly be enormous, given the manner in which property rights change hands, property interests are divided and re-divided, and administrative decisions affecting property interests are constantly being made and relied upon. Indeed, the potential for bizarre results is not difficult to envision. For example, had the Knudsens subdivided their property into hundreds of parcels, following the Howells' argument to its logical conclusion, each of the current owners would be able to assert the Knudsens' purported procedural due process claim at any time of their choosing in perpetuity, regardless of whether or to what extent others had developed their properties in

reliance on the applicable repose statutes. Irrespective of the Howells' reasoning, however, no authority could be found supporting such an argument and while the Howells argue that their property was impacted by an unconstitutional process that took place many years ago, the alleged constitutional injury was not personal to the Howells themselves. In short, the Howells have not personally suffered an injury, their interest in the outcome of a suit adjudicating the Knudsens' constitutional rights is not sufficiently concrete and the causal connection between the alleged injury and the conduct complained of is too tenuous to confer Article III standing upon them to assert the due process claims that might have been asserted by the Knudsens long ago.

Additionally, the Howells lack prudential standing, which is premised on the requirement that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). This topic was recently discussed by this Court in *Elk Grove Unified School District and David W. Gordon, Superintendent v. Newdow, et al.*, 542 U.S. ___ (2004). In *Elk Grove Unified School District*, this Court reiterated the longstanding rule that in "every federal case, the party bringing the suit must establish standing to prosecute the action." *Id.* In that regard, this Court has created a "series of rules under which [it] has avoided passing upon a large part of all the constitutional questions pressed upon [it] for decision." *Id.* (quoting *Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring)). Included among these rules is the "general prohibition on a litigant's raising another person's legal rights." *Elk Grove Unified School District*, 542 U.S. at ___ (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). As this Court has noted,

> "There are good and sufficient reasons for the prudential limitation on standing when rights of third parties are implicated – the avoidance of the adjudication of rights which those not before

> the Court may not wish to assert, and the assurance that the most effective advocate of the rights at issue is present to champion them."

Elk Grove Unified School District, 542 U.S. at ___ (quoting *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 80 (1978)).

This subject was analyzed in the following discussion in *Singleton*, *supra*:

> Federal courts must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation. The reasons are two. First, the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not. Second, third parties themselves usually will be the best proponents of their own rights. The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them. The holders of the rights may have a like preference, to the extent they will be bound by the courts' decisions under the doctrine of stare decisis. These two considerations underlie the Court's general rule: "Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party."

Id. (Citations omitted). This Court went on to recognize two narrow exceptions to this rule in cases where the "relationship between the litigant and the third party may be such the former is fully, or very nearly, as effective a proponent of the right as the latter," or where the third party is unable to assert his own right. *Id.* at 114-5. However, neither of these exceptions apply here.

The Knudsens knew about the facts giving rise to the Howells' due process claims at least by 1962 and there is nothing in the record to suggest that there was some

obstacle to prevent them from bringing such a claim during that time frame had they chosen to do so. Certainly, the Knudsens, who are believed to now be deceased, were the ones who held the rights claimed by the Howells. These rights were personal to the Knudsens and no authority could be found for the proposition that such constitutional rights pass through the chain of title to property. The Knudsens, at least by implication, expressed their preference for not pursuing a procedural due process claim by not taking action and the Howells would not be furthering the Knudsens' interests were they allowed to pursue their procedural due process claims. Thus, the Howells are not an effective proponent of the Knudsens' rights and the fact that the Knudsens apparently chose not to pursue any rights they might have had, even though there is no evidence to show that they were unable to do so, provides a substantial reason for not allowing the Howells to pursue such a claim for their own exclusive benefit on the grounds of lack of prudential standing.[10]

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[10] While the Howells appear to have limited the issues in their Petition for Writ of Certiorari to the events of 1944 and 1945 respecting the Knudsens, as is discussed above, during the proceedings below the Howells challenged the Nevada State Engineer's July 19, 1999 letter rejecting the Hawks' report of conveyance. In this regard, it should be noted that the Hawks, not the Howells, submitted the report of conveyance to the Nevada State Engineer on August 19, 1997. (See Footnote 2, above). While the Howells have indicated in their pleadings that some type of agreement was worked out between the Hawks and the Howells concerning the water rights described in the report of conveyance, no evidence has been submitted to support this assumption. Therefore, since the Hawks are not parties to this action, it is believed that the Howells have failed to establish prudential standing to raise any claims in relation to the Hawks' report of conveyance.

CONCLUSION

For all of the foregoing reasons, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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RICHARD H. BRYAN,
Governor

ROLAND D. WESTERGARD,
Director

PETER G. MORROS
State Engineer

STATE OF NEVADA
[LOGO]

DEPARTMENT OF CONSERVATION
AND NATURAL RESOURCES
DIVISION OF WATER RESOURCES
Capitol Complex
201 S. Fall Street
Carson City, Nevada 89710

September 25, 1986

RE: 11125, 11127, 21925, 21950

Royce Wood
Metropolis Route
Wells, Nevada 89835

Dear Mr. Wood:

Permit 11125, Certificate 2846, changed the point of diversion, manner and place of use of water heretofore appropriated under Proof No. 00608, Edwards Decree, pages 80-81 and 104. This included portions of "Sections 1 and 2, T.38N., R.61E.", M.D.B.&M.

Permit 11127, Certificate 2848, changed the point of diversion, manner and place of use of Proof No. 00608B, Edwards Decree, Page 81. This included the "NE¼ SW¼; SE¼ SW¼ all in Section 2, T.38N., R.61E.", M.D.B.&M.

The Proofs of Beneficial Use filed under the preceeding permits did not include any land in Sections 1 and/or

2, T.38N., R.61E., M.D.B.&M. Upon issuance of Certificates 2846 and 2848 the water rights under the Humboldt River Decree were removed from the aforementioned land.

Therefore, the only water rights existing on the sections in question are Permit 21925, Certificate 7853 and Permit 21950, Certificate 7854 (copies enclosed in the letter dated July 2, 1986).

Enclosed is a copy of a field investigation under Permit 21950, Certificate 7854. Hopefully, this will shed some light on the question of why more pasture exists than is covered by water rights.

RICHARD H. BRYAN,
Governor

ROLAND D. WESTERGARD,
Director

PETER G. MORROS
State Engineer

STATE OF NEVADA
[LOGO]

DEPARTMENT OF CONSERVATION
AND NATURAL RESOURCES
DIVISION OF WATER RESOURCES
Capitol Complex
201 S. Fall Street
Carson City, Nevada 89710

October 2, 1986

Royce Wood
Metropolis Route
Wells, Nevada 89835

Dear Mr. Wood:

Enclosed are copies of Permit 11125, Certificate 2846; Permit 11127, Certificate 2848; and Map No. 4 filed by the Pacific Reclamation Company to accompany Proof of Appropriation No. 00608.

Permit 11125, Certificate 2846, changed the point of diversion and manner and place of use of Proof 00608. The certificate changed 1.433 c.f.s. of the diversion rate of 1876 priority Bishop Creek water rights. The land to which the water was transferred does not include Sections 1 and 2, T.38N., R.61E., M.D.B.&M.

Permit 11127, Certificate 2848, changed the point of diversion and manner and place of use of Proof 006088. The certificate changed 0.381 c.f.s. of the diversion rate of

1876 priority Burnt Creek water rights. The land to which the water was transferred does not include Sections 1 and 2, T.38N., R.61E., M.D.B.&M.

The 1.433 c.f.s., 1876 priority, diversion rate from Bishop Creek and the 0.381 c.f.s., 1876 priority, diversion rate from Burnt Creek total 1.814 c.f.s. This is the entire diversion rate allocated from Bishop and Burnt Creeks as listed on page 81 of the Edwards Decree.

Therefore, it can be concluded that a water right no longer exists in Sections 1 and 2, T.38N., R.61E., M.D.B.

JOHN E. MARVEL
ATTORNEY AT LAW

285 10th Street
Elko, NV 89801

P.O. Box 2645
Elko, NV 89803

Paralegal
RAYMOND E. CONNELLY

Telephone (702) 738-9881
Fax Number (702) 738-0187

August 19, 1997

Barbara Kightlinger, Management Assistant II
Division of Water Resources
850 Elm Street
Elko, Nevada 89801

Re: *William Robert Hawks – Division of Water Resources*
Proof Nos.: 00608

Dear Barbara:

In connection with the above-mentioned proof, enclosed herewith please find the individual reports of conveyance and abstracts of title necessary to bring the ownership of that portion of proof 00608 current into the name of William Robert Hawks, et al.

The filing fees in the amount of $570.00 are enclosed, which represent payment on the following:

Portion of Proof 00608	$135.00
Portion of Proof 00608	$125.00
Portion of Proof 00608	$165.00
Portion of Proof 00608	$145.00
Total	$570.00

The subject decreed water rights are appurtenant to the land described as follows:

TOWNSHIP 38 NORTH, RANGE 61 EAST, M.D.B.&M:

Section 1: W½SW¼; SW¼NW¼
Section 2: E½SW¼; SE¼; SE¼NE¼

These water rights are specifically listed on page 81 of the Humboldt River Adjudication (Edwards Decree) under the source of Bishop and Burnt Creeks, Ditch Nos. 5 and 6, with a 1876 priority date for 147.44 acres of Harvest.

It is our understanding from previous discussions with your office that the subject water rights, in their entirety, are currently shown in the name of Stephen N. Bond. However, as you will note from the enclosed abstracts of title and accompanying deeds, Mr. Bond was only in title to a small portion of the above-described property. Therefore, the submitted abstracts of title all begin with ownership of Metropolis Land Company ("MLC"), the original claimant in the Bartlett Decree, except for a parcel in which the title chain begins with a land patent from the USA to Alonzo Knudsen, which patent was not issued until June 18, 1929 (consequently, MLC was never in title to this portion of said property).

Furthermore, it appears that the water rights adjudicated from Bishop and Burnt Creeks were erroneously transferred to Pacific Reclamation Water Company ("PRWC") under permits 11125 and 11127. Contrary to correspondence we obtained from the State Engineer's office (letter from Mr. Hugh Ricci dated

October 2, 1986) regarding the transfer of the water rights under said permits, the subject water rights appear to still remain appurtenant to lands in Sections 1 and 2. Mr. Ricci's correspondence refers to a Quitclaim Deed dated June 5, 1994, between Cooperative Security Corporation ("CSC"), as Grantor, and PRWC, as Grantee, to support said transfer. However, CSC never appears in the chain of title and, accordingly, PRWC had no interest in the water rights to transfer.

In light of the foregoing, unless there is some other documentation which we have not yet discovered or been provided by the State Engineer's Office, it appears that the subject decreed water rights should be brought current into the name of William Robert Hawks, et al., as submitted herewith.

In the event you have any questions whatsoever regarding this matter or require additional information, please immediately contact this office.

Yours truly,

/s/ John E. Marvel
JOHN E. MARVEL

JEM/rc
enclosures
cc: William Robert Hawks w/o enclos.
Fred Howell w/o enclos.

JOHN E. MARVEL
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Telephone (702) 738-9881
Fax Number (702) 738-0187

March 19, 1998

Barbara Kightlinger, Management Assistant II
Division of Water Resources
850 Elm Street
Elko, Nevada 89801

Re: *Proof Nos.: 00608*

Dear Barbara:

In reference to our recent telephone conversation regarding the above-mentioned proof, we have reviewed the deeds and legal descriptions previously submitted to your office and as you indicated, we made an error in preparation of the Report of Conveyance and Abstract of Title by stating the W½SW¼NE¼ of Section 1, T38N, R61E. The correct legal description should have been the W½SW¼NW¼ of Section 1, T38N, R61E. Therefore, enclosed herewith please find a corrected Report of Conveyance and Abstract of Title which should replace the one previously submitted.

Should you have any further questions whatsoever or require additional information regarding this matter,

please do not hesitate to give us a call. Thank you in advance for your assistance and cooperation.

Sincerely,

/s/ Ray Connelly
Ray Connelly
Legal Assistant to
JOHN E. MARVEL

REC/rc
enclosure

JOHN E. MARVEL
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December 28, 1998

R. Michael Turnipseed, P.E.
State Engineer
Division of Water Resources
123 W. Nye Lane, Suite 246
Carson City, NV 89706-0818

Re: *William Robert Hawks, et al – Proof 00608*

Dear Mr. Turnipseed:

I am writing you this letter to request your personal assistance in reviewing the status of the transfer of a portion of the above mentioned proof.

On August 19, 1997, my office submitted certain Reports of Conveyance and Abstracts of Title ("R.C.A.T.") to the Elko Office of the Division of Water Resources, which were necessary to bring the ownership of a portion of proof 00608 into the name of my client, William Robert Hawks, et al. This transfer of ownership was in accordance with a Ranch Sale Contract between my clients and Michael T. Howell and Cheri A. Howell. Please find enclosed a copy of the letter of transmittal which accompanied the R.C.A.T. for your review and consideration.

Subsequent to our submission of information, on or about March 19, 1998, we received a telephone call from Barbara Kightlinger, Management Assistant II, in the

Elko Office, regarding an error in the legal description on one of the R.C.A.T. submitted. Mrs. Kightlinger was most helpful in identifying the error and after further review on our part of several Deeds, we re-submitted a corrected R.C.A.T. for a portion of the subject proof. Please find enclosed a copy of the letter of transmittal which accompanied the corrected R.C.A.T. for your information.

From the very beginning we anticipated that this transfer would take a considerable amount of time and research by your office given the fact that the subject water rights had apparently been erroneously transferred in the past. However, inasmuch as more than sixteen (16) months have passed since we originally submitted the documentation, we now respectfully request that the transfer be immediately expedited and the portion of proof 00608 be assigned to show William Robert Hawks, et. al as the current owners of record, unless there is some other documentation which we have not yet discovered or been provided by your office.

Thank you for your attention to this matter. We will be anxiously waiting to hear from you.

Very truly yours,

/s/ John E. Marvel
JOHN E. MARVEL

JEM/mt
enclosures

cc: Mr. Fred Howell w/o enclosures

KENNY C. GUINN
Governor

PETER G. MORROS
Director

R. MICHAEL TURNIPSEED, P.E.
State Engineer

STATE OF NEVADA

[SEAL]

DEPARTMENT OF CONSERVATION
AND NATURAL RESOURCES
DIVISION OF WATER RESOURCES
123 W. Nye Lane, Suite 246
Carson City, Nevada 89706-0818
(775) 687-4380 • (775) 687-6972

February 11, 1999

RE: Proof 00608

John E. Marvel, Esq.
Attorney at Law
P.O. Box 2645
Elko, Nevada 89403

Dear Mr. Marvel:

Thank you for your letter of December 28, 1998. As requested, this office has reviewed the subject decreed water rights, as well as the concerns detailed in your letter of August 19, 1997, to Ms. Barbara Kightlinger of our Elko Branch Office. These rights were appurtenant to portions of Sections 1 and 2 within Township 38 North and Range 61 East, M.D.B.&M. under the Humboldt River Adjudication.

In your letter to Ms. Kightlinger, you refer to another letter from Mr. Hugh Ricci dated October 2, 1986. A copy of this letter has been attached as "Exhibit A", for your reference. This letter states that the only water left

appurtenant to Sections 1 and 2, T.38N., R.61E., M.D.B.&M. are those listed under Permit 21925, Certificate 7852, and Permit 21950, Certificate 7854. Both of these water rights are currently assigned to William Robert Hawks, Joyce Lee Hawks, William Roy Hawks, and Greg Alan Hawks as the current owners of record in this office. The Summaries of Ownership for these rights have also been enclosed.

After reviewing all related files, it was determined that the transfer of water rights under Permit 11125, Certificate 2846, and Permit 11127, Certificate 2848, by Pacific Reclamation Water Company was valid. These permits transferred water rights from Bishop and Burnt Creeks, listed on page 81 of the Edwards Decree in the Humboldt River Adjudication, to a new place of use that did not include Sections 1 and 2, T.38N., R.61E., M.D.B.&M.

This issue had been decided upon in February 1944 by Alfred Merritt Smith, who was then State Engineer, and Edmund Muth, the Deputy State Engineer, at that time. I would like to direct your attention to three letters, of which I have attached copies, labeled "Exhibit B", "Exhibit C", and "Exhibit D". These documents establish that the approval of Change Applications 11125 and 11127 were in compliance with the contract between the State of Nevada and Pacific Reclamation Company dated December 28, 1910.

It was also decided by the State Engineer in 1946 that all the water rights of the Pacific Reclamation Company, a Carey Act Project, are now owned by the Pacific Reclamation Water Company, and the by-laws of the Corporation will control the use of the water, as the only right to the

water the individual has is his ownership of stock in the Company and that "the last provision of Sec. 4, Chap. 140 of the Statutes of 1913" applies to the Pacific Reclamation Water Company, and the water is not appurtenant to the land in the same sense as it is in the case of an individual." Also enclosed as "Exhibit E" is a copy of Nevada Revised Statute 533.040. In particular, Paragraph 2 is relevant in this situation.

The attachment labeled "Exhibit F" is a printout obtained from the office of the Secretary of State on February 2, 1999. The Secretary of State has affirmed that the Pacific Reclamation Water Company was incorporated on April 8, 1911, in accordance with the contract between the State of Nevada and Pacific Reclamation Company dated December 28, 1910. The Secretary of State also verified that the Pacific Reclamation Water Company remains in active status to date.

I hope that this has clarified the matter for you. If I can be of further assistance, please feel free to contact me at (775) 687-4381.

Sincerely,

/s/ Lisa B. Schettler
Lisa B. Schettler
Engineering Technician V

LBS/ld
Enclosures: Summaries
Exhibits
cc: Elko Branch Office

MARVEL & KUMP, LTD.
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May 25, 1999

R. Michael Turnipseed, P.E.
State Engineer
Division of Water Resources
Capitol Complex
123 W. Nye Lane, Suite 246
Carson City, Nevada 89706

Re: *Proof No.: 00608*

Dear Mr. Turnipseed:

On December 28, 1998 I submitted a letter to your office regarding the above-referenced proof. On February 11, 1999, we received a response to my letter from Lisa Schettler of your office. We have reviewed her response with our client and are still very concerned about the position of the State Engineer's office concerning this matter.

Contrary to Ms. Schettler's assertion that all water rights under Permit 11125, Certificate 2846 and Permit 11127, Certificate 2848, transferring waters from Bishop and Burnt Creeks to a new place of use by Pacific Reclamation Water Company, were in fact valid, we previously submitted Reports of Conveyance and Abstracts of Title to your office on August 19, 1997 to reflect the correct chain of title, together with filing fees in the amount of $570.00

which have been held by your office. Pacific Reclamation Water Company does not appear in this title chain. Accordingly, it appears that the transfer of water rights evidenced by the foregoing permits/certificates is incorrect. Due to the confusion in matters pertaining to the title to these water rights, and the fact that we have been unable to reach a mutually agreeable resolution as to the proper status of these water rights, I am requesting that we schedule a meeting to discuss the same. I would be willing to meet with you at your office Carson City or, if you will be coming to Elko in the near future, we could meet here at my office to further review the specific title issues relating to the subject proof.

I would appreciate hearing from you at your earliest convenience so that we may schedule a meeting to accommodate our schedules. I will look forward to hearing from you. Thank you for your cooperation and attention to this matter.

Very truly yours,

/s/ John E. Marvel
JOHN E. MARVEL

JEM/ve

Case No. CV-2804-5

Department I

IN THE SIXTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF HUMBOLDT

ooOoo

MICHAEL T. HOWELL and CHERI A. HOWELL,

Petitioners,

v.

HUGH RICCI, P.E., NEVADA STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, STATE OF NEVADA and PACIFIC RECLAMATION COMPANY, a Nevada corporation,

Respondents. /

JUDICIAL REVIEW HEARING

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that the above-entitled matter came on for hearing on April 22, 2002, of said day, before the HONORABLE RICHARD A. WAGNER, District Judge.

* * *

[48] THE COURT: I don't know about that, but we have our share.

MR. STANTON: – and probably is more acutely aware of that than anybody else in the world.

THE COURT: Well, they're important. And as you pointed out, what has happened, the history of water law in the State of Nevada, you start off with tradition and other things, and then as more and more people come, the laws become stricter as they go along. And frankly, I think that we're only seeing the beginning of it.

And what I hear and see as water law in the State of Nevada, as water becomes more and more critical, we keep saying that and they've said it for a hundred years, but as that becomes more and more critical, this is going to become an extremely important issue in the law. Even more so and more technical than it is today.

That's what's going to happen in response to the needs right now of what's happening in the state. So I understand generally what's happened in trying to interpret past law, to put it in context to the law today is a pretty difficult thing. But that's what we're doing here today is we're trying to put it in perspective, past decisions as to how that affects important water rights of individuals today. And so, I'm certainly not adverse to hearing that because it is – water is the lifeblood of anything that we

* * *

(3)

Supreme Court, U.S.
FILED
AUG - 3 2004
OFFICE OF THE CLERK

No. 03-1627

IN THE

Supreme Court of the United States

MICHAEL T. HOWELL AND CHERI A. HOWELL,
Petitioners,

v.

HUGH RICCI, P.E., STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, AND PACIFIC RECLAMATION WATER COMPANY, A NEVADA CORPORATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondent, Hugh Ricci, P.E., Nevada State Engineer, Division of Water Resources, Department of Conservation and Natural Resources (State Engineer), disagrees with the questions presented by Petitioners, Michael T. Howell and Cheri A. Howell (Howells). The State Engineer believes the only question before this Court is whether the Nevada Supreme Court's Order of Affirmance was based on independent and adequate State grounds that preclude the Howells' requested relief.

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STATEMENT OF THE CASE

I. INTRODUCTION

The Nevada State Engineer is appointed by and is responsible to the Director of the Nevada Department of Conservation and Natural Resources and performs duties prescribed by law and by the Director of the Department. NEV. REV. STAT. 532.090, 532.110 (2003). Those duties include administering the appropriation and management of Nevada's public water, both surface and groundwater, under NEV. REV. STAT. chapters 533 and 534.

This case involves a challenge to an administrative decision of the State Engineer made in 1944 to transfer water rights adjudicated under the Humboldt River Decree from land owned by the Howells' predecessors to land owned by Pacific Reclamation Water Company (Pacific Reclamation). The Howells purchased the land to which the water rights were previously appurtenant in 1997. The Howells now seek to reverse the State Engineer's 1944 decision.

In 1997 the Howells' immediate predecessors, the Hawks, submitted a report of conveyance with the State Engineer to vest title in the disputed rights in their name. The State Engineer refused to confirm the report of conveyance because his records showed the water rights were transferred to Pacific Reclamation in 1944. Nevada law prohibits the State Engineer from confirming a report of conveyance if a conflict exists in the chain of title. *See* NEV. REV. STAT. 533.386 (2003).

The Howells filed a Petition for Judicial Review of the State Engineer's decision to refuse to confirm the report of conveyance. The Howells alleged that the 1944 transfer to Pacific Reclamation was erroneous, and therefore, a conflict does not exist in the chain of title submitted by the Hawks. Pet. App. 86-96.

The Sixth Judicial District Court of Nevada found substantial evidence supporting the State Engineer's

determination that a conflict exists in the chain of title. The District Court also found that a challenge to the 1944 decision is procedurally barred pursuant to NEV. REV. STAT. 533.450. Pet. App. 13-29. The Nevada Supreme Court affirmed. Pet. App. 1-12.

II. BACKGROUND

The Humboldt River is located in northern Nevada and flows for over three hundred miles from the high mountains in and around Elko, Nevada, to the Humboldt sink near Lovelock, Nevada. The Humboldt River is the primary source of water for the agricultural and municipal communities that have developed along its banks.

The State Engineer initiated an adjudication procedure for the Humboldt River and its tributaries in 1913. *Ormsby County v. Kearney*, 142 P. 803, 813 (Nev. 1914). From that date forward, the State Engineer was responsible for distribution of the water rights that were defined in his Order of Determination. NEV. REV. STAT. 533.220(1) (2003). The Sixth Judicial District Court of Nevada entered its final decree for the adjudication of the Humboldt River and its tributaries in 1931 (the Bartlett Decree) and amended the decree in 1935 (the Edwards Decree). The State Engineer or the Water Commissioners have distributed the waters adjudicated in the decree as officers of, and under the supervision of, the Sixth Judicial District Court of Nevada ever since. NEV. REV. STAT. 533.220(1) (2003).

The dispute in this case involves claim 00608 of the Humboldt River adjudication that is found at page eighty-one (81) of the Edwards Decree. The claim was granted to the Metropolis Land Company, and part of the claim was granted for water from Bishop and Burnt Creek for 147.44 acres of land with an 1876 priority date. Pet. App. 88. It is the water right associated with this specific 147.44 acre parcel that is at issue here.

The State Engineer's records reflect that on June 14, 1944, Pacific Reclamation filed Change Applications 11125 and 11127 with the Office of the State Engineer to change

the place of use of the water right associated with the 147.44 acre parcel from the place of use identified in the Edwards Decree to a place of use within Pacific Reclamation's irrigation project. Pet. App. 45, 55.

The Applications were processed in accordance with the Nevada Compiled Laws of 1929, in effect at the time of this transaction. Pet. App. 38-44. Notice of the Applications was published for five weeks in the *Wells Progress*, a weekly newspaper published in Wells, Nevada. Pet. App. 65-68. There is no record that a protest to either Application was filed with the Office of the State Engineer. The State Engineer approved the Applications on September 12, 1944, and issued Certificates of Appropriation on February 16, 1945. Pet. App. 45, 55, 69, 75. There is no evidence in the record that any person filed a petition for judicial review.

The State Engineer's records reflect that on June 18, 1962, Alonzo Knudsen (a predecessor to the Howells), through his attorney, sent a letter to the State Engineer's Office inquiring about the validity of Permit 11125. Pet. App. 81. The State Engineer sent a letter in response on June 22, 1962, affirming the validity of both Permits 11125 and 11127. Pet. App. 83. In 1986 the State Engineer also sent letters to Royce Wood (another predecessor to the Howells) reaffirming the validity of Pacific Reclamation's Permits. Respondent Pacific Reclamation's Appendix 1-4.

In spite of the State Engineer's earlier determinations, the Hawks (the Howells' immediate predecessors) sought to have a report of conveyance confirmed by the State Engineer in their favor. The record reflects that on August 19, 1997, the Hawks wrote a letter to the State Engineer's Office stating that the water rights were erroneously transferred to Pacific Reclamation under Permits 11125 and 11127. And, on March 19, 1998, the Hawks filed a report of conveyance with the State Engineer seeking to transfer the water rights. Respondent Pacific Reclamation's Appendix 8-9. On February 11, 1999, the State Engineer issued a written decision denying the

Hawks' request and reaffirming the validity of Permits 11125 and 11127. Respondent Pacific Reclamation's Appendix 12-14.

On May 25, 1999, the Hawks sent another letter to the State Engineer challenging the decision to uphold Permits 11125 and 11127. Respondent Pacific Reclamation's Appendix 15-16. On June 15, 1999, an assistant with the State Engineer's Office sent a letter to the Hawks stating that the waters had been assigned to show the Hawks as the owners. Pet. App. 84. The letter stated that the decision was "subject to amendment upon receipt of additional information." Pet. App. 84. On July 19, 1999, the assistant sent another letter to the Hawks rescinding the June 15, 1999, letter and reaffirming the validity of Permits 11125 and 11127. Pet. App. 30-31.

III. JUDICIAL PROCEEDINGS

A. Proceedings before the Sixth Judicial District Court of Nevada.

On August 18, 1999, the Howells filed a Petition for Judicial Review from the July 19, 1999, letter of the State Engineer with the Sixth Judicial District Court of Nevada. Pet. App. 86-96. The Howells requested the Court enter an Order requiring the State Engineer nullify Permits 11125 and 11127 and complete the chain of title in the disputed water rights submitted by the Hawks.

The Howells' argument centered on the contention that the Hawks' superior chain of title to the real property provided legal grounds for moving the water right back to where it was prior to the approval of Applications 11125 and 11127.

Both the State Engineer and Pacific Reclamation filed briefs in opposition. The State Engineer argued that he was prohibited pursuant to NEV. REV. STAT. 533.386 from confirming the report of conveyance because Permits 11125 and 11127 presented a conflict in the Hawks' chain of title. In addition, the State Engineer and Pacific Reclamation

argued that, pursuant to NEV. REV. STAT. 533.450, the Howells were procedurally barred from challenging the State Engineer's 1944 decision to approve Applications 11125 and 11127.

The District Court heard oral argument and, on May 23, 2002, entered its Findings of Facts, Conclusions of Law and Judgment. The District Court affirmed the State Engineer's decision to reject the Hawks' report of conveyance and dismissed the Howells' petition for judicial review, with prejudice. Pet. App. 13-29. The District Court found substantial evidence supported the State Engineer's decision to reject the report of conveyance pursuant to NEV. REV. STAT. 533.386. Pet. App. 29. The District Court also found that the Howells were procedurally barred pursuant to NEV. REV. STAT. 533.450 from petitioning the District Court for judicial review of the State Engineer's 1944 decision to grant Applications 11125 and 11127. Pet. App. 29.

B. Proceedings before the Nevada Supreme Court.

On June 12, 2002, the Howells filed an appeal with the Nevada Supreme Court. The Howells requested the Nevada Supreme Court reverse the District Court's order and require the State Engineer to alter his records to reflect the Howells as the owners of claim 00608 of the Humboldt River Decree.

The Howells again argued that the Hawks' superior chain of title to the real property provided legal grounds for moving the disputed water rights back to their land. Also, the Howells argued, for the first time, that the State Engineer denied the Knudsens due process of law in the 1944 transaction.

Both Pacific Reclamation and the State Engineer filed briefs in opposition, arguing that NEV. REV. STAT. 533.386 prevented the State Engineer from confirming the report of conveyance and that the Howells' claims were barred pursuant to NEV. REV. STAT. 533.450.

The Nevada Supreme Court heard oral argument and on April 1, 2004, entered its Order of Affirmance, signed by all seven justices. Pet. App. 1-12. The Nevada Supreme Court concluded that substantial evidence supported the State Engineer's decision to deny the report of conveyance pursuant to NEV. REV. STAT. 533.386 and that the District Court correctly concluded that the Howells' petition was procedurally barred pursuant to NEV. REV. STAT. 533.450. Pet. App. 1-12.

At the conclusion of its opinion, the Nevada Supreme Court added the following footnote: "In light of our disposition of the other issues litigated in this appeal, we reject the Howells' claim that the original 1944 permits are void for lack of procedural due process." Pet. App. 11. Thus the Nevada Supreme Court found it unnecessary to resolve the Howells' procedural due process argument based upon its resolution of the state law claims.

REASONS FOR DENYING THE PETITION

I. INTRODUCTION

On June 1, 2004, the Howells filed their Petition for Writ of Certiorari to this Court. In their Petition the Howells continue to challenge the State Engineer's 1944 decision to issue Permits 11125 and 11127. The Howells allege the Knudsens were deprived of due process in the 1944 transaction, and the Nevada Supreme Court rejected their due process claims on the merits. The Howells' attempt to re-characterize this case as involving significant due process issues, however, is without merit. The Nevada Supreme Court relied on independent and adequate State grounds when it affirmed the trial court's decision to dismiss the Howells' Petition for Judicial Review.

Pursuant to SUP. CT. R. 10, "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for *compelling reasons*." SUP. CT. R. 10 (emphasis added). Further, a principal purpose for which the United States Supreme Court uses certiorari jurisdiction is to resolve

conflicts among circuit Courts of Appeals and state courts concerning meaning of provisions of *federal law*. *Braxton v. United States*, 500 U.S. 344, 347 (1991).

In this case the Nevada Supreme Court ruled that the District Court properly upheld the State Engineer's decision to deny the Howells' report of conveyance pursuant to NEV. REV. STAT. 533.386. The Nevada Supreme Court also ruled that the Howells' challenge to the State Engineer's decision to grant Applications 11125 and 11127 is procedurally barred pursuant to NEV. REV. STAT. 533.450. Pursuant to these rulings, the Nevada Supreme Court determined it was unnecessary to resolve the Howells' due process contentions. Therefore, the Nevada Supreme Court did not decide or resolve a federal issue, and this Court should deny the Howells' request for certiorari review.

II. THE NEVADA SUPREME COURT DID NOT DECIDE OR RESOLVE A FEDERAL ISSUE

The Howells assert the United States Supreme Court has jurisdiction to hear this case under SUP. CT. R. 10(b) and allege that the Court "has decided an important federal question in a way that conflicts with long standing decisions of the Supreme Court of the United States." Petition for Writ of Certiorari at 6. The Howells base this statement, and thus the United States Supreme Court's jurisdiction, entirely on footnote 24 found at the end of the Order of Affirmance. The footnote states:

> In light of our disposition of the other issues litigated in this appeal, we reject the Howells' claim that the original 1944 permits are void for lack of procedural due process.

The Howells state that "[t]he Court apparently connects the due process issues in some way to the 'other issues' addressed in its Order, but the footnote offers no further explanation." Petition for Writ of Certiorari at 11.

The "other issues" addressed in the Order are the Court's resolution of the State law claims, namely, that the

State Engineer was prohibited by statute from confirming the report of conveyance and that the Howells' contentions regarding the 1944 transfer are procedurally barred. Thus the only logical interpretation of footnote 24 is that the Court found it unnecessary to consider the Howells' due process contentions in light of the resolution of the State claims. The Nevada Supreme Court never resolved or decided the Howells' due process claims, nor was it necessary for the Court to do so. Therefore, the Nevada Supreme Court did not decide a federal issue and this Court should not review this case under SUP. CT. R. 10(b).

III. THE STATE ENGINEER WAS PROHIBITED BY STATE LAW FROM CONFIRMING THE REPORT OF CONVEYANCE

The Nevada Supreme Court ruled that the State Engineer was prohibited from confirming the Hawks' report of conveyance because Permits 11125 and 11127 presented a conflict in the Hawks' chain of title. Pursuant to this ruling, it was not necessary for the Nevada Supreme Court to consider the Howells' due process claims. The existence of Permits 11125 and 11127 statutorily prohibited the State Engineer from confirming the Hawks' report of conveyance.

In 1995 the Nevada State Legislature enacted NEV. REV. STAT. 533.382—.387. Prior to the enactment of these statutes, the State Engineer was often placed in the unintended role of resolving title disputes affecting water rights. One result of the 1995 amendments was NEV. REV. STAT. 533.386, which provides:

> 1. The State Engineer shall confirm that the report of conveyance required by paragraph (a) of subsection 1 of NRS 533.384 includes all material required by that subsection and that:
>
> (a) The report is accompanied by the prescribed fee;

(b) *No conflict exists in the chain of title* that can be determined by the State Engineer from the conveyance documents *or from other information on file in the office of the State Engineer;* and

(c) The State Engineer is able to determine the rate of diversion and the amount of water conveyed in acre-feet or million gallons from the conveyance documents or from other information on file in the office of the State Engineer.

. . . .

3. *If the State Engineer determines that the report of conveyance is deficient, he shall reject* the report of conveyance and return it to the person who submitted it with:

(a) An explanation of the deficiency; and

(b) A notice stating that the State Engineer will not confirm a report of conveyance that has been rejected unless the report is resubmitted with the material required to cure the deficiency. The notice must also include a statement of the provisions of subsection 4.

4. The State Engineer shall not consider or treat the person to whom:

(a) An application or permit to appropriate any of the public waters;

(b) A certificate of appropriation;

(c) An adjudicated or unadjudicated water right; or

(d) An application or permit to change the place of diversion, manner of use or place of use of water,

> is conveyed as the owner or holder of the application, right, certificate or permit for the purposes of this chapter, including, without limitation, all advisements and other notices required of the State Engineer and the granting of permits to change the place of diversion, manner of use or place of use of water, until a report of the conveyance is confirmed pursuant to subsection 1. [Emphasis added.]

Significant here are sections 1 and 3 of NEV. REV. STAT. 533.386. Section 1 provides that the State Engineer shall confirm a report of conveyance *unless* a conflict exists in the chain of title that can be determined by the State Engineer. Section 3 provides that if a report of conveyance is deficient, the State Engineer *shall* reject the report of conveyance. As the District Court observed, "[t]he intent of this provision was to take the State Engineer out of the position of resolving title disputes." Pet. App. 23. Title disputes should be resolved in an appropriate action, such as an action to quiet title.

The District Court also pointed out that "if substantial evidence exists in the record to support the State Engineer's determination that [the Howells'] report of conveyance should be rejected because of a conflict in the chain of title, then the State Engineer's decision must be upheld." Pet. App. 19. Both the District Court and the Nevada Supreme Court agreed that substantial evidence supported the State Engineer's determination that a conflict exists in the chain of title, since the records of the State Engineer's Office indicate the water right the Howells sought to have confirmed was taken off their predecessors' land through Applications 11125 and 11127. Therefore, the District Court and the Nevada Supreme Court upheld the State Engineer's decision to refuse to confirm the Hawks' report of conveyance pursuant to NEV. REV. STAT. 533.386.

The State Engineer was statutorily obligated to reject the Hawks' report of conveyance. The Nevada Supreme Court did not resolve the Howells' due process contentions because they are irrelevant to the analysis under NEV. REV. STAT. 533.386.

IV. THE HOWELLS' CHALLENGE TO THE 1944 TRANSFER IS PROCEDURALLY BARRED BY STATE LAW.

The District Court and the Nevada Supreme Court also recognized that the Howells' challenge to the 1944 decision to grant Applications 11125 and 11127 is procedurally barred. Therefore, it was not necessary for the Nevada Supreme Court to resolve the Howells' claim that the Knudsens did not receive due process in the 1944 transaction.

NEV. REV. STAT. 533.450 establishes the procedure by which a person aggrieved by a decision or order of the State Engineer may obtain judicial review. A party must commence proceedings to review the decision or order within thirty days following its rendition. NEV. REV. STAT. 533.450 states, "[a]ny person feeling himself aggrieved" by an order or decision of the State Engineer has thirty days to appeal that decision.

In this case Alonzo Knudsen, through his attorney, sent a letter to the State Engineer's Office in 1962 inquiring about the validity of Permit 11125. Pet. App. 81. The State Engineer sent a letter in response affirming the validity of both Permits 11125 and 11127. In 1986 the State Engineer also sent a letter to Royce Wood (another predecessor to the Howells) reaffirming the validity of Permits 11125 and 11127.

In spite of these earlier determinations, the Hawks sought to have the State Engineer confirm a report of conveyance in their favor. On February 11, 1999, the State Engineer issued a written decision denying the Hawks' report of conveyance and reaffirming the validity of Permits 11125 and 11127.

On May 25, 1999, the Hawks sent a letter to the State Engineer challenging his decision to uphold Permits 11125 and 11127. On June 15, 1999, the State Engineer's Office sent a letter to the Hawks stating the waters had been assigned to show the Hawks as the owners. Pet. App. 84. The letter stated that the decision was "subject to amendment upon receipt of additional information." Pet. App. 84. On July 19, 1999, the State Engineer's Office sent another letter to the Hawks rescinding the June 15, 1999, letter and reaffirming the validity of Permits 11125 and 11127.

The Howells filed a Petition for Judicial Review from the State Engineer's July 19, 1999, letter wherein he refused to confirm the Hawks' report of conveyance. Pet. App. 86-96. The State Engineer and Pacific Reclamation, however, argued that the July 19, 1999, letter did not result in an appealable decision within the meaning of NEV. REV. STAT. 533.450. The Howells tried to circumvent NEV. REV. STAT. 533.450 by arguing that the July 19, 1999, letter was a new decision subject to judicial review.

The District Court and the Nevada Supreme Court both recognized that the July 19, 1999, letter was not a separate decision subject to judicial review, but was merely a reaffirmation of a much earlier decision and did not change the positions of the parties.

Therefore, the Howells' challenge to the 1944 transaction is barred. The Nevada Supreme Court did not resolve the Howells' due process contentions because they are irrelevant to the analysis under NEV. REV. STAT. 533.450.

CONCLUSION

The Nevada Supreme Court relied on independent and adequate state grounds when it affirmed the District Court's decision to dismiss the Howells' Petition for Judicial Review. The Nevada Supreme Court expressly ruled that NEV. REV. STAT. 533.386 and NEV. REV. STAT. 533.450 independently preclude the Howells' requested relief.

The Howells' attempt to re-characterize this case as one involving significant due process issues is without merit. The State Engineer was statutorily obligated to reject the Hawks' report of conveyance. Furthermore, the Howells' challenge to a decision made over fifty-five years ago is procedurally barred.

The Nevada Supreme Court did not resolve or decide the Howells' due process issues. This is not the type of case that warrants review by the United States Supreme Court. Accordingly, the State Engineer respectfully requests this Court to deny the Howells' Petition for Writ of Certiorari.

Respectfully submitted,

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August 2004

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No. 03-1627

SUPREME COURT, U.S.
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In The
Supreme Court of the United States

MICHAEL T. HOWELL AND CHERI A. HOWELL,

Petitioners,

v.

HUGH RICCI, P.E., STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, AND PACIFIC RECLAMATION WATER COMPANY, A NEVADA CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Nevada

REPLY OF MICHAEL T. HOWELL AND CHERI A. HOWELL IN SUPPORT OF THEIR PETITION FOR WRIT OF CERTIORARI

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REPLY OF MICHAEL T. HOWELL AND CHERI A. HOWELL IN SUPPORT OF THEIR PETITION FOR WRIT OF CERTIORARI

I. The Respondents Present No Effective Response to the Violation of Due Process.

Neither the Respondents, Pacific Reclamation Water Company (Pacific Reclamation), nor the State Engineer attempt to refute the authorities advanced by the Petitioners (the Howells) that:

> (a) Published notice to the Knudsens violates the due process clause of the Fourteenth Amendment as interpreted by *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950), and other cases cited by the Howells.
>
> (b) The decision of Nevada's State Engineer to divest the Knudsens of their water rights violates due process of law, because it was a collateral taking in excess of his statutory authority, and therefore void. See *Noble v. Union River Logging Co.*, 147 U.S. 165, 176 (1892).

Instead, Pacific Reclamation makes five arguments which it presumes will pre-empt the Constitutional issues. The State Engineer essentially joins in the first three of these arguments.

1. The Nevada State Engineer Was Prevented by Statute from Confirming the Hawks' Report of Conveyance Because of a Conflict in the Chain of Title.

This argument fails because it relies on bootstrap logic. If the State Engineer's decision deprived the Knudsens of their property without due process of law, it was

void and had no legal status or power to create any conflict in a chain of title. See e.g. *Noble, supra*; see also *Eldorado at Santa Fe, Inc. v. Cook*, 822 P.2d 672, 676 (N.M. 1991); *Bell v. Anderson*, 849 P.2d 350, 351 (Nev. 1993). Therefore the statute upon which the Respondents rely (NRS 533.382ff) does not pertain, and neither Pacific Reclamation nor the State Engineer nor the Supreme Court of Nevada may use it to sidestep the due process issues.

2. The Howells' Due Process Claims Are Procedurally Barred Under NRS 533.450.[1]

This is a statute of limitations argument, or statute of "repose" as Pacific Reclamation describes it. The State Engineer joins in this argument. The logical gap in this approach is that Pacific Reclamation assumes the State Engineer has jurisdiction to make all decisions. If the State Engineer's decision was without jurisdiction, it was also void, and the statute never commences to run. *Bogart v. Lathrop*, 523 P.2d 838, 840 (Nev. 1974); *Hilton v. Lincoln County*, 169 P.2d 329, 332 (Ore. 1946); see also *Crosby v. Bradstreet Co.*, 312 F.2d 483 (C.A. 2d 1963), *cert. den.*, 373 U.S. 911. Using Pacific Reclamation's logic, the State Engineer could have issued his decision with no prior notice, and the 30-day appeal statute would still run against the Knudsens. If Pacific Reclamation concedes that some notice was required before he made a decision, it must then argue that the State Engineer is bound only by Nevada statute, but not by the Constitution. Pacific Reclamation cites no case which elevates the State Engineer to such

[1] NRS 533.450 was NCL 1929 §7961 in 1944. It allows 30 days to appeal a decision. It does not require that the State Engineer give notice of his decision.

status. Finally, neither Respondent denies that the State Engineer was beyond his statutory authority in giving the Knudsens' rights to Pacific Reclamation.

3. The Reference to Due Process in the Order of Affirmance Is *Obiter Dictum.*

The State Engineer's version of this argument is that the Supreme Court of Nevada did not mean what it said. The Court said that it rejected the Howells' due process claim. According to the State Engineer, the Court meant that it "found it unnecessary to consider" the Howells' claim. (State Engineer brief p. 8). Pacific Reclamation simply labels the Court's due process language as "dictum."

Both arguments beg the issue. The issue is whether the level of attention devoted to due process by a lower court, controls review by the Supreme Court of the United States. If the lower court had ignored due process altogether, it still decided the case in a way that conflicts with the Fourteenth Amendment. Supreme Court Rule 10(c) therefore applies. Neither may a state court prevent the consideration of Constitutional questions by the Supreme Court, which had to be considered by the state court in order to reach its conclusion. 28 U.S.C. §1257; *Wilson v. Cook*, 327 U.S. 474, 480 (1946); *Honeyman v. Hanan,* 300 U.S. 14, 18 (1937). Whether Nevada's Supreme Court viewed the issues as dictum or failed to consider them at all, the Court was in error. Its error excused a taking of property without due process of law and must be corrected.

4. The Howells' Due Process Claims Are Barred Under the Statute of Limitations.

This argument has no more validity than the statute of limitations argument in Section 2 above. Regardless of Pacific Reclamation's speculation to the contrary, there is no evidence that the Knudsens were aware of the State Engineer's decision until their attorney wrote to the State Engineer in 1962. (App. 81). When they became aware is irrelevant in any event, because a victim's knowledge of a void act does not make it valid. No statute of limitations runs in its favor. See *Bogart* and *Hilton*, *supra*. This includes Nevada's NRS 11.220.

Pacific Reclamation hopes to deflect the impact of *Mullane*, by labeling its application to the case at hand retroactive. The Central Hanover Bank and Trust Company may have used the same argument in *Mullane*, but the effort was obviously unsuccessful. Neither can Pacific Reclamation claim equitable status of the sort advocated by Justice O'Connor through her dissent in *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 113 (1993). Pacific Reclamation has demonstrated no injurious reliance upon the State Engineer's decision prior to 2000, when it was rewarded with a windfall for which it had paid nothing. Neither can Pacific Reclamation prove the loss of "valuable property rights" in the form of a statute of limitation which will never run.

Reynoldsville Casket Co. v. Hyde, 514 U.S. 749 (1995) is inapplicable. This is because the State Engineer failed to implement his decision until April, 2000. Neither Pacific Reclamation nor the State Engineer is in a position to argue that any "degree of finality" existed prior to that date. Likewise, while the State Engineer delayed implementation

of his decision for 55 years, Pacific Reclamation passively watched, and hardly merits remedial relief on grounds of finality. It is not as though Pacific Reclamation had been growing hay since 1944, using the Knudsen water right.

The foregoing discussion assumes that *Mullane* concepts are being retroactively applied to the State Engineer's decision. *Mullane* cites *Wuchter v. Pizzutti*, 276 U.S. 13 (1928), which itself provided satisfactory warning to the State Engineer of the importance of adequate notice.

Finally, Pacific Reclamation cannot apply its retroactivity argument to *Noble v. Union River Logging Co.*, *supra*. Pacific Reclamation does not even mention the case or address the issues which it presents. Pacific Reclamation therefore implicitly admits that the State Engineer had no power under NCL 1929 §7944, §7948, or §7970 to give away the Knudsens' water rights. (App. 38-44). Those rights had been adjudicated to the Knudsens' ranch by the State Engineer's predecessor, and confirmed by the Sixth Judicial District Court of Nevada in the Humboldt River Decree (App. 2, 87-88). *Kern River Co. v. United States,* 257 U.S. 147, 151-2 (1921), which cites *Noble*, holds that the federal government would be required to file a suit in equity to divest the owner of a right-of-way previously granted under federal law. *Noble* and *Kern* are Fifth Amendment cases, but their reasoning is applicable to state governments and the Fourteenth Amendment as well. *Heiner v. Donnan*, 285 U.S. 312, 326 (1932). Certainly the State Engineer had no statutory jurisdiction to divest the Knudsens' water rights under Nevada statutes which specifically prohibit the impairment of vested rights. (App. 44).

5. The Howells Lack Standing to Raise Their Procedural Due Process Claims.

Pacific Reclamation's final effort is its contention that the Howells lack Article III and prudential standing to assert their claim. The Howells have no disagreement with the case law cited by Pacific Reclamation. Using the plain and ordinary meaning of the case language, the Howells meet all requirements for Article III standing. The State Engineer cut off the water to the ranch when the Howells were its owners. To paraphrase *Northeastern Florida Chapter of A.G.C.A. v. City of Jacksonville*, 508 U.S. 656, 663-64 (1993), as of April 2000, the Howells suffered an invasion of their property rights which was concrete, particularized and actual, resulting in injury directly traced to the conduct of the State Engineer. This injury may be readily redressed by return of the water right, and the water that goes with it, to the Howells. If Pacific Reclamation does not comprehend the invasion and subsequent injury, it will feel no loss when the rights are returned to their rightful owners.

In its brief (p. 26) Pacific Reclamation states, without referring to any evidence, that "the Howells purchased their real property many years later knowing full well that the water rights at issue in this case had been previously taken off the property." This unsupported statement falsely presumes that the Howells had the same view of due process as Nevada's courts. It is also contradicted by the finding of Nevada's Supreme Court that the Howells fought to have their chain of title recognized. (App. 3-5).

As far as prudential standing is concerned, the case cited by Pacific Reclamation, *Singleton v. Wulff*, 428 U.S. 106 (1976), resolves the issue. The Howells now own the

ranch. Pacific Reclamation presents no evidence, and there is nothing in the record to indicate that any prior owner had reserved the water rights in question. This is to say that all of these water rights were passed by the Knudsens to the Howells through mesne conveyance. There are no third parties holding rights pertinent to this case. See *Singleton*, pp. 113-14.

Without citing a case to support the proposition, Pacific Reclamation argues that the right to challenge the State Engineer's decision was personal to the Knudsens. The legal reality is that the decision was void, and it was subject to collateral attack. The failure of the first victim to attack it does not mean that it has risen from the dead. Although the facts of the case at hand do not require it, it is certainly arguable that imposition of a standing prerequisite improperly ascribes validity to a void act. *cf. Canal Insurance Co. v. Cambron*, 242 S.E. 2d 32, 36 (Ga. 1978), *cert. den.*, 439 U.S. 805.

II. Conclusion

The Howells' case is a perfect example of the reason for the Fourteenth Amendment. They have lost their water rights because of a state agency decision rendered without jurisdiction and premised upon inadequate notice. The

Respondents have presented no effective response. The Howells' Petition for Certiorari should be granted.

Respectfully submitted,

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